No. 340.

Brief of Cotter for P. E.

Filed Oct. 14, 1897.

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JAMES H. McKEN

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 340.

THOMAS BRAM, ALIAS, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES E. COTTER,
ASA P. FRENCH,
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ERRATA.

Page 5, line 28, *for* "30" *read* "3"
" 6, " 2, " "30" " "3"
" 13, " 29, " "*case*" " "*cause*"
" 17, " 7, " "*sale*" " "*sail*"
" 19, " 27, " "*tell Mr. Monks, so*" read "*tell Mr. Monks so;*"
" 29, last line, " "*O'Connor*" read "*O'Connell*"
" 45, line 25, " "*Kloo*" " "*Koo*"
" 92, " 13, " "*described*" " "*discussed*"
" 77 " 5 " Whit 7 " Whit. 2
" 88 + alsewhere " Stymes " Stymean

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Statement of the Case.

I.

Facts.

(Tr. pp. 21–23.)

On the night of the thirteenth and fourteenth of July, 1896, Charles I. Nash, master of the barkentine, the *Herbert Fuller*, Laura A. Nash, his wife, and August W. Blomberg, the second mate, were murdered in their beds on the vessel while on the high seas, bound from Boston to Rosario (*via* Buenos Ayres) in South America.

The *Herbert Fuller* left the port of Boston with a load of

lumber, on July 2, 1896, and was, when the crimes were committed, in about latitude 36° N., longitude 53° W. (Tr., Log Sheets, date July 14.) There were on board, besides the persons murdered, Thomas Bram, otherwise called Thomas M. Bram, the plaintiff in error (hereinafter called the defendant), who was first officer, a steward, six seamen, and one passenger.

The murders were committed during the first mate's watch, which began at twelve o'clock midnight. The vessel was on the starboard tack and under full sail, with the wind about two points abaft the beam on the starboard quarter. The sheets, especially the spanker sheets, were eased well off, and she was sailing at the rate of six or seven knots an hour. (Tr. p. 44.) Between twelve and two o'clock, Captain Nash, Mrs. Nash, Blomberg, and the passenger (Monks) were below in their respective separate rooms in the after-cabin (shown on plan, Tr., facing page 125); the defendant was officer of the watch on deck; two of the seamen, Loheac and Perdok, were on the lookout, and another seaman, Justus Leopold Westerberg (*alias* Charles Brown), took the wheel, which was behind the after-house, and a few feet only from the after-companionway leading down to the rooms occupied by the persons who were murdered. (Tr., Plan, facing page 125.) The steward and the rest of the crew testified that they were in their quarters in the forward house, asleep. The passenger, Monks, who occupied the room between the captain's room and that of Mrs. Nash, aroused not far from two o'clock, as he testified, by a scream and by a gurgling sound, went from his room to that of Captain Nash, and then to Mrs. Nash's room, and, upon discovering their condition, went on deck and gave the alarm to the defendant. Together, he and the defendant at once made a hasty inspection of the chart-

room, where Captain Nash's body was, and then returned to the deck, where they remained until about daybreak, when they called the steward. Upon going down into the after-cabin, it was then found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently inflicted with a sharp instrument like an axe. Blomberg was lying on his back in his berth, with his feet crossed; Mrs. Nash was in her room, and at the back side of the bed; and Captain Nash lay on the floor, with the cot on which he had slept overturned.

The whole crew were called at about daylight and were informed of the deaths.

At first, after the discovery of the murders, there was some hesitancy as to where the vessel should be taken. At the defendant's suggestion, she was headed toward Cayenne in French Guiana, but later the plan was changed, and she steered for Halifax, N.S., where she arrived on July 21, and was taken possession of by the local authorities at the request of the Consul General of the United States.

No blood, or spots of blood, were ever discovered on the person or the clothing of the defendant. Before reaching Halifax, and a day or two after the murders had been committed, suspicion was excited in respect to the seaman Westerberg, *alias* Brown, and the crew, under the supervision of the defendant, seized and ironed him. The defendant navigated the ship until the Sunday (July 19) before the Tuesday on which they arrived at Halifax. On that day (Sunday), Brown, who was then in irons, for the first time told one or more of the other sailors that he saw into the cabin through a window in the after part on the starboard side of the house, and saw Bram, the defendant,

kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the defendant and put him in irons, he making no resistance, but declaring his innocence. He and Brown were both carried into Halifax in irons. All the ship's company, including the passenger, were kept in confinement at Halifax. The defendant, while there, was brought alone before one Power, a local official detective, by whom he was told to submit to an examination, and was searched, stripped, and examined, no one else being present. The defendant was then in custody, and did everything he was directed to by Powers. (Tr. p. 42.)

Subsequently the crew, including the defendant and Brown, and the passenger Monks, were sent by steamer to Boston.

The defendant and Brown were both held for the grand jury. Brown testified before the grand jury. The defendant did not.

On October 29 the grand jury returned an indictment against the defendant for the murder of Charles I. Nash and Laura A. Nash; also an indictment against him for the murder of August W. Blomberg, *alias*. No bill was found against Brown.

At the October term, 1896, of the United States Circuit Court for the District of Massachusetts, the Honorable LeBaron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, presiding, the defendant was tried upon the first-mentioned indictment under the counts charging the murder of Charles I. Nash, — the other counts having been *nol prossed*, — was convicted of the murder of said Charles I. Nash, and sentenced to be hanged.

At the trial the defendant took the stand as a witness in

his own behalf. It was contended by the defence (Tr. p. 46), among other things, that the seaman Brown — whose duty it was, at the time when the murders were committed, to be at the wheel — had equal opportunity with the defendant to commit the murders charged, and that, under the conditions of wind and water existing on the night of the murders, he (Brown) could have lashed the wheel of the vessel and left it for a sufficiently long period to commit the crimes, without thereby causing the vessel to deviate perceptibly from her course.

Brown's testimony (see Tr. p. 118 *et seq.*) was the only direct evidence of the killing. (Tr. p. 121.)

The trial began on Monday, the fourteenth day of December, 1896, and was concluded on Saturday, the second day of January, 1897.

II.

Questions Involved and Raised by the Record.

The questions raised for the consideration of this court, and which are now pressed, may be divided into three classes: (*a*) those raised preliminary to the trial; (*b*) those raised during the trial; and (*c*) those raised in connection with the two motions for a new trial.

(*a*) *Questions Raised Preliminary to the Trial.*

(1) That the indictment was invalid because one of the grand jurors who found and returned said indictment was permitted to affirm instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn. (Tr. pp. 30, 31.) (Asst's 1, 2, 3.)

This question was raised under the plea and supplementary plea in abatement. (Tr. pp. 30, 31.)

(2) That the indictment was invalid because, one of the jurors affirming, the caption of said indictment did not recite that it was presented upon the oath *and affirmation* of the jurors. (Tr. pp. 3, 31.) (Ass't 5.)

This question was raised on motion to quash.

(3) That the array was illegal because, whereas the court on November 17, 1896 (Tr. p. 13), had ordered that special venires should issue for one hundred additional petit jurors to come in on the fourteenth day of December, 1896 (the day assigned for the trial of this case to begin), of whom fourteen were ordered to be brought in from the city of Cambridge, — the United States marshal did not comply with said order, but, in disregard thereof, returned only eighty-six men, none of whom were from the city of Cambridge. (Tr. p. 14.) (Asst's 6, 7, 8, 9.)

This question was raised on a challenge to the array. (Tr. pp. 36, 37.)

(4) That the array was illegal, further, because fourteen jurors in attendance for the regular business of the court for the October term, and included in the order of Judge ALDRICH of December 7 (Tr. p. 14), were added in lieu of the Cambridge quota; and that the apportionment among the cities and towns prescribed in the order of November 17 (Tr. p. 13), heretofore referred to, was not observed.

This question, also, was raised by challenge to the array. (Ass't 10.)

(5) That the array was illegal, further, because the subordinate venires were directed to and served by constables of the several cities and towns named in the order,

contrary to the provision of the statutes of the United States. (Tr. p. 14.) (Ass't 9.)

This question, also, was raised by challenge to the array.

(*b*) *Questions Raised During the Trial.*

(6) That the court should not have permitted the detective Power to testify (Tr. p. 43) as to the conversation between himself and the defendant at Halifax while the defendant was in custody; because, under the circumstances, the defendant's statement was not a free and voluntary statement. (Ass't 14.)

(7) That the court should have permitted the defendant, in the cross-examination of Power, and for the purpose of showing interest, to ask him, "What other articles belonging to the defendant did you take possession of at that time?" (Tr. p. 44.) (Ass't 15.)

(8) That the United States attorney should not have been permitted to ask the sailors Anderson, Loheac, Slice, Perdok, and Wassen (Tr. pp. 44–46) hypothetical questions with reference to the wheel of the vessel, the answers to which tended to show that the wheel could not have been left on the night of the murders so that the vessel would not either fall off or come up to the wind, because—

(*a*) This line of inquiry was not a legitimate part of the government's case in chief.

(*b*) The witnesses were not qualified to answer the questions. (Asst's 16 to 21, inclusive.)

(9) That Dr. Draper should not have been allowed, against the defendant's objection, to express an opinion, as an expert, as to whether a man standing at the hip of a re-

cumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered or covered with some of the blood; because —

(*a*) The question was not a proper question for an expert.

(*b*) If it were a proper question for an expert, Dr. Draper was not qualified to answer it. (Ass't 22.)

(10) That the language of Judge WEBB, in the presence of the jurors, during the cross-examination of the defendant, as to the loose sheets which the defendant had said were duplicates of the log, to wit, "He [the defendant] was making something to be used as evidence; a pure manufacture at that time" (Tr. p. 52), was a violation of the defendant's right to an impartial trial, and had a tendency to seriously prejudice him in the minds of the jury. (Ass't 23.)

(11) That the court should have permitted the defendant to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified (Tr. p. 53) that he showed to Captain Nash; because, the government having claimed that the defendant at the time of shipment had misled Captain Nash as to himself and his previous career by stating certain facts which were testified to, the defendant should have had an opportunity to introduce evidence of all that was said or shown to Captain Nash by him in that connection. (Ass't 24.)

(12) That Edward G. Parker, a government witness called in rebuttal of the defendant's claim that his first suggestion to take the vessel to Cayenne was a reasonable one, inasmuch as that was the nearest port in South America on the line of their destination, should not have been allowed

to testify (Tr. p. 56) as to how long it would take to go from Cayenne to Buenos Ayres, because it appeared that he had never sailed from Cayenne to Buenos Ayres or from Cayenne to any other port in South America. (Ass't 27.)

(13) That that part of the closing argument of the United States attorney, as follows (Tr. p. 58): "He [referring to the defendant] says that Charlie Brown could leave the wheel. I say he could not. They [referring to counsel for the defendant] have produced a lot of sea captains to say that he could leave the wheel. I put on Mr. Cutler, who was a mate on that vessel, and if you can argue from the non-production of witnesses, can you not argue from the failure to put questions?" — was so improper and so prejudicial to the defendant, especially when coupled with the comment of Judge WEBB upon it, viz., "The facts are before the jury, the fact of calling the witnesses," — as to constitute reversible error, even though withdrawn: because the court had excluded the testimony to which the United States attorney referred, and which he nevertheless sought to argue to the jury by inference as if it were in. (Ass't 33.)

14. That the attitude of Judge WEBB during the trial toward the question of the guilt or innocence of the accused, as indicated by certain questions and comments in presence of the jury, were of such a nature as to deprive the defendant of a fair trial. The questions and comment to which especial reference is made are the following: —

(*a*) The question to the government witness Loheac (Tr. p. 60) (*Q.* by WEBB, J.): "When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?" *A.* "Yes, sir."

(Loheac's testimony tended to show that if Brown had left the wheel, which the defence contended he could have done for a sufficient length of time to commit the murders, the course of the vessel would have been materially changed. The "person upon the deck" referred to the defendant, who was officer of the watch.)

(*b*) During the cross-examination of the defendant (Tr. p. 60 and comment: "He [the defendant] says he never did tell Mr. Monks so. If he never did and Monks says he did, every one will understand the consequences."

(*c*) The characterization of the loose sheets made up by the defendant as "a pure manufacture," to which reference has already been made, and is to be made, in this brief, in other connections.

(*d*) The characterization (Tr. p. 63), during its progress, of a portion of the closing argument of the senior counsel for the prisoner as "far-fetched." (Asst's 23, 34, 35, 36.)

(15) That the court, in a capital case, should, *in favorem vitae*, have allowed the general exception of the defendant taken at the conclusion of the charge to the jury, and before the jury had retired; viz. (Tr. p. 59), —

> "And now comes the defendant after the charge and before the jury have retired, and claims an exception to all objectionable and prejudicial matter, whether it was elicited by the government or the court, and to all statements of fact and opinion and examination of witnesses by one member of the court during the trial, which said matter, statements of fact, and opinion, and of the examination of witnesses, more specifically appear in the official stenographic report of said trial, to which reference is

hereby made at pages 1080, 1348, 1372, 1385, 1482, 1483, 1484, 1490, 1572, 1593, 2000, and *aliunde*, and whether such statements, opinions, and examinations were withdrawn or not, on the ground that "no right of exception is, or can be, waived in a capital case." (Ass't 37.)

(16) That the reading by the court to the jury, after they had deliberated between nineteen and twenty hours without arriving at a verdict (Tr. p. 63), of the statement of law found on page 63, however true such a statement may be as a general proposition, was inappropriate under the circumstances of this case, and calculated to mislead the jury, and to unduly influence the minority to conform to the opinion of the majority. (Ass't 38.)

(*c*) *Questions Raised in Connection with the Two Motions for a New Trial.*

(17) That the court (see Assignments 40, 48, 50, 53, 54) should have permitted the defendant in support of the first motion for a new trial, and in corroboration of the allegation contained in the affidavit of the juror Booth (Tr. p. 66), to wit, that one of the jurors, Briggs, during the trial and at an adjournment, while the defendant was on the stand, had said in the presence and hearing of several of the jurors, "I am a Freemason; the defendant, Bram, is not a Freemason; he is a hypocrite," to ask the juror Jack the following questions: "Before this case was finally submitted to the jury, did the juror Briggs engage in conversation with you, or in your hearing, with reference to the defendant?" Also, "After the jurors left the court-room on one of the days when the defendant was on the witness-stand, did the juror Briggs engage in conversa-

tion in regard to the defendant with one or more of his fellows?" Also, "Did the juror Briggs say that he himself was a Freemason and that the defendant was not?" Also, "Did the juror Briggs state to you, or to other of the jurors, that the defendant is a hypocrite?" Also, "In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?" Also, "Did Mr. Briggs state in the presence of all the jurors, after they were empanelled and before the case was finally submitted to the jury, that he, Mr. Briggs, was a Mason and that the defendant was not, and that the defendant was a hypocrite? Did he make this statement to all of the jurors?"

(18) That the court (see Assignments 40, 42, 44, 45, 46, 47, 48, 51, 54, 55) should have permitted the defendant, in support of the allegation contained in the motion for a new trial, of misconduct on the part of certain of the jurors, to ask certain witnesses whom he called upon this point, namely, Bean, Whoriskey, and Jack, as to certain conversations with the juror Briggs tending to show bias or misconduct on his part.

(19) That the court (see Assignment 43) should not have refused to consider the affidavit of Edgar L. Bean, filed by the defendant in support of the first motion for a new trial.

(20) That the court (see Assignment 56) should not have allowed the government, at the close of the evidence introduced by the defendant in support of the first motion for a new trial, to introduce any testimony in reply to that of the defence, because the government had not filed any counter-affidavits, or joined issue in any way upon the record, with the defendant, as to the facts alleged in his

motion or set out in the affidavits filed by him in support thereof.

(21) That the court, after receiving the supplementary affidavit of the juror Booth (Tr. p. 66), which described the experiment made by the jurors in the jury-room after the case was submitted to them, and after hearing evidence thereupon, erred in refusing to consider that evidence, and in ruling as a matter of law that it was inadmissible. (Tr. p. 107.) This question is raised by the plaintiff in error under paragraph 7 of Error 57, on the ground that the court by its said ruling (Tr. p. 107) declined to consider all the evidence offered; that evidence of the experiment should have been considered; and, if considered, it would, being uncontradicted, have been sufficient to justify the court in ordering a new trial.

(22) That the court (see Assignments 58, 59, 60), in denying the first motion for a new trial, did not exercise its discretion, but erred in ruling as matters of law, in substance, *first*, that comment made by one of the jurors during the trial was not admissible in evidence in support of the motion; *second*, that the paper found in the juror Booth's hat, under the circumstances testified to, would not invalidate the verdict; *third*, that something more than mere suspicion of misconduct on the part of the bailiff or a stranger is necessary in order to warrant the setting aside of a verdict; and *fourth*, that the interruption by the court of, and comment upon, the final argument of the defendant's counsel where the court stated that a certain portion of said argument was "far-fetched," was not a case for granting a new trial.

(23) That the court (see Assignment 63) should have allowed the exceptions taken in the course of the hearing upon the first motion for a new trial, so far at least as they

related to matters as to which the court had refused to exercise discretion.

(24) That the court (see Assignment 64) should not have ruled, as a matter of law, that the evidence contained in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly discovered evidence, and which tended to show in substance that, under the conditions existing on the night of the murder, it was impossible for one standing at the wheel, as the witness Brown said he stood, to see anything in the after-cabin, was cumulative evidence, and also in holding that the motion must therefore, as a matter of law, be overruled.

(25) That the court (see Assignment 65) should not have ruled as a matter of law, in connection with this motion, that the facts (Tr. p. 124) show laches on the part of the defendant or his counsel in not being prepared at the trial with the evidence of the facts contained in said affidavits.

(26) That the court (see Assignment 66) should have allowed the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence, at least so far as they referred to matters as to which the court had refused to exercise discretion, and as to matters upon which the court had passed as questions of law.

Specification of Errors relied upon.

Sixty-seven errors are assigned in the writ of error which are set out in the printed transcript of the record, pages 127 *et seq.* In this Court, the plaintiff in error filed, on

the 18th day of September, 1897, a Substituted Assignment of Errors, in which the errors originally alleged are set out more fully and specifically in certain instances than in the assignment filed in the court below. The errors now relied upon are specified in this brief in the form in which they appear in the Substituted Assignment, and are as follows: —

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's supplemental plea in abatement.

3. The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court.

6. The court erred in overruling the defendant's challenge to the array.

7. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

8. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array.

9. The court erred in ruling that the venires had been properly served except that which ran to Cambridge: that the challenge to the array could not be supported, and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

10. The court erred in ruling that the jurors mentioned in the order of Judge ALDRICH were as regularly summoned and attending as those who had been summoned pursuant to the venires ordered on the 17th day of November.

14. The court erred in permitting the witness Power to testify to the conversation between him and the defendant at Halifax while the defendant was in custody, as follows: "When Mr. Bram came into my office, I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said, 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said, 'He could not have seen me; where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer, but I don't know anything about it.' He was rather short in his replies.

"*Q.* Anything further said by either of you?

"*A.* No, there was nothing further said on that occasion."

15. The court erred in not permitting the defendant to ask the witness Power on cross-examination, "What other articles, belonging to the defendant, did you take possession of at that time?"

16. The court erred in permitting the witness Anderson to answer the following question put to him, during the government's case in chief, by the United States attorney: "If the vessel is on the starboard tack, and under full sail, and the sheet is eased off, and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?"

To which question the witness answered, "The vessel would either keep off or go in the wind."

17. The court erred in permitting the witness Loheac to answer the following question put to him by the United States attorney: If you were steering that vessel when she was sailing in a six or seven knot breeze, and she was under full sale on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter, what effect would it have on the vessel; what would the vessel do, if you took your hands off the wheel?" To this question the witness answered as follows: "She would either fall off or come to the wind, sir."

18. The court erred in permitting the witness Slice to answer the following question put to him by the United States attorney: "When the *Herbert Fuller* was sailing with sheet well off and all sails set, with the wind on the starboard quarter, about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind, sir."

19. The court erred in permitting the witness Perdok to answer the following question put to him by the United States attorney: "When the *Herbert Fuller* was sailing, say six or seven knots an hour, with the wind on the starboard quarter, a couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?" To this question the witness answered as follows: "You take it off and the spanker must come over at the same time; if you took your hands off, the vessel would fall off and the spanker would want

to go over to the leeward side — right over, if it stayed that way. If it was over the port side, it would go over to starboard."

20. The court erred in permitting the witness Perdok to answer the question, "Now what effect would it have on that vessel under these conditions, if you lashed that wheel?" To this question the witness answered as follows: "Just the same."

21. The court erred in permitting the witness Wassen to answer the following question put to him by the United States attorney: "Suppose the *Herbert Fuller* was sailing the high seas at the rate of seven knots an hour with the wind abaft the beam on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free, what effect would it have if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind or keep off."

22. The court erred in permitting the witness Frank W. Draper to answer the question, "Whether in your opinion a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an axe, would necessarily be spattered with, or covered with, some of the blood?" To this question the witness answered as follows: "My answer is that under the conditions framed in the question, the assailant in such a case would not necessarily receive blood spots upon his person or clothing."

23. The court erred in characterizing, during the progress of the trial, and while the defendant was on the witness stand, certain writings which the defendant called "duplicates" of the log, as follows: "He was making

something to be used as evidence, a pure manufacture at that time."

24. The court erred in not permitting the defendant, for the purpose of meeting the suggestions of the government that the defendant misled Captain Nash at the time of shipment, to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified he showed to Captain Nash.

27. The court erred in permitting the witness Parker to testify in rebuttal how long it would take to go from Cayenne to Buenos Ayres, as follows: "Not less than 75 or 80 days."

33. The court erred in permitting the United States attorney, in his closing address to the jury, to argue upon evidence excluded by the court, and the court erred, when the defendant excepted to this line of argument, in making the following comment: "The facts are before the jury, and the fact of calling the witnesses."

34. The court erred in asking the witness Loheac the following question: "When the vessel was allowed to fall off, or get in the wind from any cause, would a person upon the deck know the facts?" To which question the witness answered, "Yes, sir."

35. The court erred, during the examination of the defendant, in making the following comment: "The question is only meant to emphasize the other answer. He says he never did tell Mr. Monks, so if he never did, and Monks says he did, every one will understand the consequences."

36. The court erred in characterizing a portion of the closing argument of the counsel for the defendant as "far-fetched."

37. The court erred in not allowing the general excep-

tion of the defendant taken at the conclusion of the charge to the jury and before the jury had retired.

38. The court erred in instructing the jury as follows:

"In respect to your duties I desire to read to you from one of the leading cases on the subject.

"The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view, it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a

reasonable one, which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention with an equal desire to arrive at the truth, and under the sanction of the same oath.

"And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

40. The court erred in refusing to permit the defendant to ask the witness Jack the following question: "Before this case was finally submitted to the jury, did the juror Briggs engage in conversation with you, or in your hearing, with reference to the defendant?"

41. The court erred in refusing to permit the defendant to ask the witness Bean at the hearing upon the first motion for a new trial to "state what was said by Mr. Briggs [a juror] as to his views of the case before it was fully submitted."

42. The court erred in refusing to admit, at the hearing upon the first motion for a new trial, any expression of opinion that any of the jurors had made after the trial to

third parties as to his state of mind during the progress, or as to his state of mind at the conclusion, of the trial.

43. The court erred in refusing to receive the affidavit of Edgar L. Bean, filed by the defendant, in support of his first motion for a new trial.

44. The court erred in refusing to permit the defendant at the hearing upon said motion to ask the witness Barry the following question: "Did he [juror Briggs] state his views of the case, or of the defendant, afterwards, after he came on the panel, any views he formed?"

45. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "Did he [juror Briggs] say anything in regard to his views of the case before the case was submitted to the jury?"

46. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "Did he [juror Briggs] state to you what his views were concerning the defendant Bram, or what he did before the case was finally submitted to the jury?"

47. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "What did Mr. Briggs say, if anything, in regard to being present at the execution or the hanging of the defendant?"

48. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "After the jurors left the court room on one of the days when the defendant was on the witness stand, did the juror Briggs engage in conversation in regard to the defendant with one or more of his fellows?"

49. The court erred in not permitting the defendant at

the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs say that he himself was a Freemason and that the defendant was not?"

50. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs state to you, or to other of the jurors, that the defendant is a hypocrite?"

51. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs state to you, or any of his fellows in your presence, before the case was finally submitted to the consideration of the jury, 'I should like to see that man hung'?"

53. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon the said motion the following question: "In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant, and that he did not respond?"

54. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon said motion the following question: "Did Mr. Briggs state in the presence of all the jurors, after they were empanelled and before the case was finally submitted to the jury, that he, Mr. Briggs, was a Mason, and that the defendant was not, and that the defendant was a hypocrite? Did he make this statement to all of the jurors?"

55. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon said motion the following question: "Did he state immediately upon entering the jury-room after the case had been

submitted to the jury, and they had retired for deliberation, in the presence of all the jurors, that he should like to be present at the execution of the defendant?"

56. The court erred generally in permitting the government, at the close of the evidence introduced by the defendant in support of said motion, to introduce any testimony in reply to that introduced by the defence, and specifically in permitting the witnesses Ford and Briggs to testify.

57 (paragraph 7 only). The court erred in not ruling, at the close of the evidence upon said motion for a new trial, as follows: Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

58. The court erred in ruling, in substance, that comment made by one of the jurors during the trial was not admissible in evidence under said motion.

59. The court erred in holding that the paper found in the juror Booth's hat under the circumstances testified to would not invalidate the verdict.

60. The court erred in ruling, in substance, that something more than a mere suspicion of misconduct on the part of a bailiff or a stranger is necessary in order to warrant the setting aside of a verdict.

61. The court erred in ruling that the interruption by the court of and comment upon the final argument of the defendant's counsel where the court stated that a certain portion of said argument was "far-fetched" was not a cause for granting a new trial.

63. The court erred in refusing to allow the defendant's exceptions taken in connection with the first motion for a new trial.

64. The court erred in ruling that the evidence contained

in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly discovered evidence, and which tended to show in substance that, under the conditions existing on the night of the murder, it was impossible for one standing at the wheel, as the witness Brown said he stood, to see anything in the after-cabin, was cumulative evidence.

65. The court erred, in disposing of said last-named motion, in ruling that the facts show laches on the part of the defendant or his counsel in not being prepared with the evidence of the facts contained in said affidavits at the trial.

66. The court erred in refusing to allow the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence.

67. The court erred in its conclusions of law that the second motion for a new trial "must be overruled."

Argument.

Points Preliminary to the Trial.

I.

1. *The indictment was invalid* (Ass'ts 1, 2, 3) *because one of the grand jurors who found and returned it, was permitted to affirm instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn.* (*Tr. pp.* 3, 31.)

The statute of Massachusetts (Pub. St. c. 213, sec. 6) provides that —

"When a person returned as grand juror is conscien-

> tiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word 'affirm' instead of the word 'swear,' and also the words, 'This you do under the pains and penalties of perjury,' instead of the words, 'So help you God.'"

This is, in Massachusetts, the "affirmation in judicial form" required by Rev. St. U.S. c. 1, sec. 1 (see Rev. St. U.S. sec. 800), and is, we contend, to be substituted for the oath only when the juror is conscientiously scrupulous of taking an oath. It contemplates inquiry of the juror who refuses the oath to ascertain if he is so conscientiously scrupulous. Just how far the investigation of his conscience shall be carried may not be clear, but there should at least appear to be some reason other than his unexplained refusal to justify the substitution. The phraseology of the statute cannot be construed as equivalent to "When a grand juror *declines* to take the oath," etc. The words "conscientiously scrupulous" are pregnant words, and it is clearly the intent of the statute that an affirmation shall not be resorted to merely to evade the moral restraint of an oath. It may well be that the grand juror's own statement that he has conscientious scruples against swearing — just as the statement of a petit juror upon his *voir dire*, in a capital case, that he has conscientious scruples against capital punishment — must ordinarily be taken to be final upon the question of his qualification, but he must at least make his statement as a foundation in both cases. If he does so, there then exists evidence upon which the presiding judge may find the fact, although it would even then be clearly competent for the court, upon further investigation, to disbelieve him, and to refuse to allow him

to affirm. If he does *not* make the statement, there is nothing to justify the court in permitting the substitution for the oath of the less solemn and religious asseveration. That such an inquiry would not always be truthfully answered is hardly a sufficient objection to our contention. In any event, it is one which, we submit, the spirit of the statute requires to be made. In the case at bar it does not appear that the grand juror Merrill was inquired of as to this point, or that he was conscientiously scrupulous of taking an oath, or made any statement in regard to it except that he "affirmed and declined to take an oath." (Tr. p. 31.)

2. *If Merrill did make "affirmation in judicial form" in accordance with the statute of the United States and of Massachusetts, then the indictment should have been presented upon the oath* and affirmation *of the grand jurors.*

The St. 3 & 4 Wm. 4, c. 49, sec. 1, enacted —

> "That every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration instead of taking an oath in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law or by any act of Parliament already made or hereafter to be made, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form."

Pursuant to this statute, Mr. Baron ALDERSON, at the Worcester assizes of 1839, when the grand jury was called and it appeared that one of them was a member of the

Society of Friends and made affirmation, directed that all indictments should commence, —

> "The jurors for our Lady the Queen upon their *oath and affirmation* present that &c."
>
> 9 C. & P., 78.

See, also, —

> *Rex* v. *Dann*, 1 Moody Crown Cases, 424.
> *Commonwealth* v. *Fisher*, 7 Gray, 492.
> *State* v. *Harris*, 7 N.J. L., 361.
> *Same* v. *Gibbons*, 4 N.J. L., 40–46.
> *Same* v. *Fox*, 9 N.J. L., 244.
> *Same* v. *Price*, 11 N.J. L., 203.
> 3 Burns Justice, 16.
> Whar. Cr. Pl. & Pr., sec. 95.

If any of the jurors affirm, the defendant is fairly entitled to notice of the fact on the face of the indictment, that he may inquire, should he wish to do so, whether or not the person so affirming was entitled to affirm within the meaning of the statute; for, if not, the indictment found against him would be void.

II.

1. *The array was illegal* (Ass'ts 6–9) *because, whereas the court, on November* 17, 1896 (*Tr. p.* 13), *had ordered that special venires should issue for one hundred additional petit jurors to come in on Monday, the* 14*th day of December*, 1896 (*the day assigned for the trial of this case to begin*), *of whom fourteen were ordered to be brought in from the city of Cambridge, the United States marshal*

did not comply with said order, but, in disregard thereof, returned only eighty-six men, none of whom were from the city of Cambridge. (*Tr. p.* 14.)

Section 802 of the Revised Statutes provides that jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services. Pursuant to this section, and for the purposes therein enumerated, the court had made an order (of November 17) for the bringing in, for the trial of this case, by special venires, of one hundred additional petit jurors from certain towns and cities therein named, including fourteen from the city of Cambridge. This list was thereby judicially declared to constitute that apportionment which was "most favorable to an impartial trial," etc. The venire was not served upon the city of Cambridge, and, in disregard of this order of the court, no jurors were returned from there. (See affidavits of Brandon, Tr. pp. 38, 39.) In other words, the marshal failed to bring in the list of jurors which the court had by its order, pursuant to the statute, declared to be "most favorable to an impartial trial." Of a consequence, the jurors whom he did return *were not* most favorable to an impartial trial, and the defendant was thereby prejudiced. No stronger argument upon this point can be found in the books than the learned and exhaustive discussion of the question by Lord DENMAN, before the House of Lords, in *O'Connell* v. *The Queen*, 11 Cl. & Fin. 155 (at pages 351 *et seq.*). The facts, so far as they relate to this objection to the array, were closely like those of the case at bar. In the O'Connor case, fifty-nine names had been

omitted from the list of jurors of the county of the city of Dublin. It is true that the omission was there alleged to have been fraudulent, but, as will be seen, the element of fraud does not enter into the reasoning of the learned judge. "If it is possible," said he, "that such a practice as that which has taken place in the present instance, should be allowed to pass without a remedy (and no other remedy has been suggested), trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery and a snare. The traversers challenged the array on account of the fraudulent omission of fifty-nine names from the list of jurors of the county of the city of Dublin. The attorney-general demurs to that challenge, admitting thereby that that fact has taken place. It appears to me that that challenge ought to have been allowed. . . . I think [p. 352] that the principle of challenge to the array is not confined to the narrow issue whether the sheriff has done wrong, but involves that larger question whether the party has had the security of a trial by a lawful jury of his country."

In the same case Lord COLERIDGE is quoted by Lord DENMAN (p. 353) as saying, in a written opinion rendered by him, —

> "It seems to me that all questions touching the formation of juries must be examined by the judges with very critical eyes."

Lord DENMAN continues (p. 357) as follows: —

> "The ground of challenge to this array was, that after the recorder had exercised his judicial functions, after he had determined, 'This shall be the list for

the county of the city of Dublin for the ensuing year,' somebody else had said, 'This shall not be the list; that is the list, and that shall be taken and that shall become the jurors' book.' The handing over the perfect list by the recorder to the sheriff is a ministerial act, but that ministerial act has been imperfectly, or rather, not at all, performed. The challengers say, you have deprived your own judicial act, which has been properly performed, of the weight of authority to which it was entitled. You, yourself, have handed over a list which has made the book imperfect and therefore we contend that that is no book. . . . Is it not right [p. 361] to hold the public officer to the strict and faithful discharge of his easy duty? Can anything be more wrong than that he should enjoy full license to tamper with these sacred documents according to his pleasure? In that short passage [pp. 362, 363] in Lord COKE, which contains the whole of the learning upon this subject (Co. Litt. 156) he cites a case from the Year Books, which is twice reported. . . . The sheriff returned a list which the bailiff of the franchise ought to have returned; that was held to be wrong *prima facie* because it deprived the party of his challenge against the bailiff individually, but then it was argued, 'Oh, but there are good names enough returned by the sheriff to insure the party a fair trial:' exactly the argument which appears to have succeeded in Dublin. But the Court held . . . that as the array was one entire indivisible thing, one error would vitiate the whole, and the whole was accordingly set aside. *In that very case the sheriff was charged with unindifferency; the question of his unindifferency was tried, he*

was acquitted upon that charge; and yet the fact of his having done, though not with any corrupt or partial intention, that which gave a different jury, was deemed a default sufficient to set aside the whole proceedings [p. 363]."

As has already been suggested, it appeared in the case cited that there was an omission of 59 names out of 700. This, Lord DENMAN observed, seemed to him to be a great proportion. (It was still greater in the case at bar.) He goes on to say in this connection (p. 365), "It is obviously by no means impossible that, if those 59 names had appeared in the panel, the whole jury might have been drawn from those names; and who can tell me that the effect of the evidence upon the minds of the jury might not have been entirely different if they had consisted of those gentlemen? That, however, is a subject upon which I think I am not at liberty to enter. *I consider that it cannot be incumbent upon any person to prove any other particular injury, than simply and solely that one of Her Majesty's subjects, put upon his trial, has not had the security which is provided for him by law that that trial shall be a fair one.*"

In the same case, Lord CAMPBELL, in the course of his opinion (p. 411) says, "I entertain little doubt that the challenge ought to have been allowed." The judgment of the court below was reversed.

See —

McQueen v. *State*, 10 So. (Ala.) 433; (s.c.) 94 Ala. 50.

Darby v. *State*, 92 Ala., 9.

State v. *Jenkins*, 32, Kan., at pages 477, 479.

2. *The order of Judge* ALDRICH *of December 7th (Tr. p. 14) was a still further interference with the order of November 17th (Tr. p. 13), an infringement of the statute, and a violation of the defendant's rights,* —

because the addition of the fourteen jurors therein named to the jurors returned under the special venires ordered November 17th, materially altered the apportionment from the various cities and towns named in the table designated by the court. (Tr. pp. 13, 15.) The coincidence between the number of the regular-term jurors included in the order of Judge ALDRICH, and the number which, under the special venire for this trial, was to be drawn from Cambridge, indicates that somebody knew, as early as December 7th, that the Cambridge jurors were not to be summoned. In this connection, see affidavits of Brandon. (Tr. pp. 38, 39.) The defendant was not present when this order was made. (Tr. p. 125.)

In *Nealon* v. *People*, 39 Ill. Ap., 481, it was held that neglect by a county court to conform to the provisions of the Illinois Revised Statutes, c. 78, secs. 1 and 2, namely, to select from the original list a sub-list, as required, was sufficient ground for a challenge to the array. In this case the court, by CONGER, P.J., well says (p. 485), —

> "If, in all cases, an accused person, who has unsuccessfully challenged the array of jurors, must before he can successfully assign error upon the action of the court in overruling his challenge, show that some positive injury has been done him by the failure or irregularity, then any of the provisions of the jury law might be violated, and the accused could not be heard to complain. . . . It is the right of an accused to

have a jury selected in compliance with the law, and any substantial and material departure from the methods pointed out by the statute is certainly a wrong to him of which he has a right to complain."

The sections of the Illinois statute referred to are as follows: —

SEC. 1. "Be it enacted by the people of the state of Illinois, represented in the General Assembly, that the county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purposes of this act, make a list of a sufficient number, not less than one tenth of the legal voters of each town or precinct in the county, giving the place of residence of each name on the list, to be known as the jury list.

SEC. 2. "At the meeting of the county board in the respective counties in this state, in September, in the year 1874, and in each year thereafter, such board shall select from such list a number of persons equal to one hundred for each trial term of the circuit and other courts of record, except county courts, which may be provided by law to be held during the succeeding year, and in the county of Cook, two hundred for each term of the circuit and superior courts of Cook county, and one hundred for the criminal court of Cook county for each trial term to serve as petit jurors: *Provided* that the persons selected to serve as jurors in courts of record having jurisdiction only in and for cities, shall be selected from four of the most convenient towns to said court, to be designated by the judge of such court, and the county clerks of

the county notified thereof before the first day of September next: and in making such selection shall choose a proportionate number from the residents of each town or precinct, and shall take the names of such only as are;

"*First.* Inhabitants of the town or precinct not exempt from serving on juries.

"*Second.* Of the age of twenty-one years or upwards, and under sixty years old.

"*Third.* In the possession of their natural faculties and not infirm or decrepit.

"*Fourth.* Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language."

III.

The array was illegal, further (Ass't 9), *because the subordinate venires were not served in the manner prescribed by section* 803 *of the Revised Statutes, namely, by the marshal in person or by his deputy.*

The subordinate venires were severally directed to the constables of the respective cities and towns named in the table referred to in the order of the court of November 17, 1896. (Tr. pp. 13, 14.) This was clearly a failure to comply with the law regulating the manner in which jurors shall be summoned. The officers designated by the statute are persons who are responsible to and under the control of the Federal government, for the performance of a specified duty. Local constables are not so responsible, and service by them was in violation of the explicit provisions of the law.

In *Durrah* v. *The State*, 44 Miss. 789, the court, at page 796, speaking of the causes for which the array may be quashed, says, "It must be either for some misconduct in the officer which would be fraudulent, or it must be founded on some manifest error committed in selecting, drawing or summoning the jurors by not pursuing the law."

This statute, as well as section 802, is mandatory, and must be construed strictly. A failure to comply with either is ground for reversal.

Thompson & Merriam on Juries (ed. 1882) p. 79.
United States v. *Woodruff*, 4 McLean, 105.
Hall v. *Com.*, 80 Va., 555-560 (1865).
Richards v. *Com.*, 81 Va., 110 (1885).
Harrison v. *State*, 3 Tex. App., 558.
Hunter v. *State*, 31 S.W. Rep., 674 (Texas, 1895); 34 Tex. Cr. Rep., 599.
Posey v. *State*, 73 Ala., 490.
Brazier v. *State*, 44 Ala., 387 at page 392.
People v. *McKay*, 18 Johns., 212 (at page 217).
Wells v. *State*, 94 Ala., 1.

In *People* v. *McKay*, 18 Johns., 212 (at page 217), SPENCER, C.J., says,—

> "A sheriff's return of the manner in which he has performed his duty must be made on this process [the venire] that the Court may be officially informed that the sheriff has duly obeyed its mandate. Inasmuch then as a venire was necessary at the common law and as the statute yet requires it to be issued, the omission to issue it we must consider an error apparent on the record: and in such a case, affecting life, we do not feel ourselves authorized to dispense with a process

required by the common law and also by the statute, although we may not be able to perceive much use in continuing it. . . . *It is a humane principle applicable to criminal cases and especially when life is in question, to consider the prisoner as standing upon all his rights and waiving nothing on the score of irregularity.*"

We are aware that there are cases and *dicta* in some jurisdictions which seem to approve a contrary doctrine as to the service of venires, but this court has never so held, and we submit that the principle for which we contend is based upon sound reasoning and the weight of authority.

Is it not more just and reasonable to hold judicial and ministerial officers to "a strict and faithful discharge of their easy duty" explicity defined by statute and mandate, than to say, "It is true the statutes and the order of the court were not complied with, yet it is not apparent that the defendant was thereby injured"? We submit that the language of Baron DENMAN, and of Judges CONGER and SPENCER, already quoted, decisively answers this question.

Points During the Trial.

I.

The court should not have permitted the detective, Power, to testify (Tr. p. 43) as to the conversation between himself and the defendant at Halifax, while the defendant was in custody, under the circumstances disclosed by the testimony. (Ass't 14.)

The defendant was brought to Halifax in irons, and there kept in confinement. While thus in custody, he was

taken before one Power, a local official detective, who searched him and talked with him. (Tr. p. 23.) Power testified (Tr. p. 42) that he made an examination of the defendant in his (Power's) office, no one else being present; that no threats were made to the defendant nor inducements held out to him. The witness was then asked, "What did you say to him and he to you?" To this question the defendant's counsel objected, and was permitted to cross-examine the witness before the court ruled upon the objection. Upon this cross-examination the witness stated, in addition to the foregoing, that he (the witness) asked that the defendant should be brought to his office for the purpose of interviewing him; that he there stripped the defendant, and examined his clothing but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do, etc. (Tr. p. 42.) One member of the court then asked the witness the leading questions which are found in the record. (Tr. p. 43.) Thereupon the defendant renewed his objection, assigning the reasons therefor. (Tr. p. 43.) The objection was overruled, and the defendant alleged an exception. The witness answered as follows: "When Mr. Bram came into my office, I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said, 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder. He [the defendant] said, 'He could not have seen me; where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us

here think you could not have done all that crime alone. If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies."

That Power's testimony — notably the expression of his confident opinion of the defendant's guilt — was exceedingly damaging to the defendant is undeniable. We think it is equally undeniable that the alleged conversation took place under such circumstances as to render it incompetent as an inferential admission or confession; in other words, that it was not a free, voluntary, and spontaneous statement within the meaning of the decisions bearing upon testimony of this class. It can hardly be contended that it was a considerate or humane way to treat the prisoner. The purpose was to elicit evidence against him in support of the accusation made by Brown. The method adopted, so far as it may be gathered from what was said and done, was very like browbeating. The attitude of the officer was that of one with absolute authority over the person and property of the prisoner; he took extraordinary liberties with him, and whatever he ordered the prisoner did without question. (Tr. p. 42.) Again, his attitude was that of one who had prejudged the prisoner, upon the statement (apparently uncorroborated) of one who was himself in custody under suspicion of the same offence. The language used was of a kind from which the tone may be easily inferred, and, we submit, in spite of the witness' statement, elicited by the court, that no threats nor inducements were made or held out, and that what was said by Bram was entirely voluntary and uninfluenced by the witness, contains both covert threats and covert inducements.

Fairly interpreted, Power's acts and language were equivalent to the following: "Bram, I've got you here, and you must do as I say. You are in a pretty tight position, and it will be well for you to tell the truth. Brown says you killed the captain, and I am positive that you did. It's no use for you to say you didn't. But some of us think you're not the only one that had a hand in it. If you didn't do it alone, it will be better for you to say so," etc. The whole aim and purpose of the examination and interview was to intimidate the prisoner and induce him to say something which would tend to incriminate him. In the interest of fairness and public justice, such inquisitorial methods should not be countenanced. They are not consistent with the principle of fair play. Testimony of this sort should be admitted with the greater caution when the prisoner and detective are alone.

There must be no direct or implied inducement, however slight, and no exertion of any improper influence.

3 Am. & Eng. Enc. of Law, 449, and cases cited.
Ibid. 464, and note 1.

And where an express denial is made of any inducement or threat, it will avail nothing if afterwards, upon receiving the testimony, it appears that inducements were held out or threats made, or that the prisoner was in any way improperly influenced.

Com. v. *Taylor*, 5 Cush., 605.
State v. *Patterson*, 73 Mo., 695 (706).

Since the decisions in *Reg.* v. *Drew*, 8 C. & P., 140, and *Same* v. *Morton*, 2 Moo. & R., 514, the English law

upon this subject has undergone considerable change, and the doctrine in England is now to be found in *Reg.* v. *Garner*, 1 Denn. C.C., 329; in *Reg.* v. *Fennell*, L.R., 7 Q.B. Div., 147; and in *Reg.* v. *Mansfield*, 14 Cox, C.C., 639.

In *Reg.* v. *Garner*, *supra*, the alleged confession was not made in the presence of any person having official authority. The inducement was merely that it would be better for the prisoner to tell the truth. It was nevertheless held inadmissible.

In *Reg.* v. *Fennell*, *supra*, the prisoner was taken into a room with the prosecutor and a police inspector. The prosecutor then said to him, "He [meaning the inspector] tells me you are making house-breaking implements; if that is so you had better tell the truth, it may be better for you." The court held that the confession which was thereupon made was inadmissible.

In *State* v. *Dildy*, 72 Nor. C., 325, the defendant was charged with murder, and a witness for the state testified that he was one of the party that went out to arrest the prisoner on the day of the homicide, that he and two others came up to the prisoner. They had arms in their hands, but did not present them at the prisoner. They did not inform him that they had come to arrest him. The prisoner did not appear to be at all frightened. The witness asked the prisoner, "What made you kill Charles Goy?" The prisoner then inquired of the witness, "Is he dead?" To this the witness replied, "You ought to know he is dead when you killed him." The witness then stated that the prisoner then and there confessed that he shot the deceased, saying that he thought to shoot him in the legs, but did not intend to kill him. The court held that the con-

fession under these circumstances was not voluntary and was inadmissible.

In *Kelly* v. *The State*, 72 Ala., 244, the language was very much like that in the case at bar. The officer said to the prisoner, "You have got your foot in it, and somebody else was with you. Now if you did break open the door the best thing you can do is to tell all about it, and to tell who was with you and to tell the truth, the whole truth and nothing but the truth." The court says, "The exhortation to the prisoner did not stop with adjuring him to tell the truth, or only with telling him that the best thing he could do was to tell all about it, in the event he was guilty of the breaking. It goes further, by assuming his guilt and by assuming also that the prisoner was accompanied by one or more accomplices; and he was told in effect, that it would be best for him to tell all about these assumed facts. The manifest impression produced on the prisoner's mind must have been that he would, in some unknown manner, fare better by confessing his guilt of the crime of burglary; and this inducement vitiates any confession evoked under its influence."

In the case at bar there was the same assumption of guilt; the same assumption that there was an accomplice; the same suggestion that it would be better for the prisoner to tell the truth: but there was also the further and more significant suggestion that he ought to tell the truth so that he might not have the blame (either legal or moral) of this horrible crime on his own shoulders. To be sure, this last inducement did not elicit a confession in terms. The immediate answer was not responsive, but it was not an express, emphatic, and indignant denial; it was a reply which, it might fairly be argued, an innocent man would not have made. It might be construed as a guarded an-

swer, indicating the accomplice inquired about, without express implication of the speaker's own guilt. The conversation as a whole, it might be contended, could hardly be explained upon any theory consistent with the innocence of the accused.

If the prisoner made answers which could fairly be regarded as admissions or indications of guilt, and those answers were prompted by fear or inducement due to the circumstances in which he was placed, and to the language and attitude of the officer, such answers are, we submit, as inadmissible as a confession in terms.

In *Sparf* v. *United States*, 156 U.S., 343, the trial court instructed the jury that they should act on evidence of this character with great caution; that if it was induced by promises of hope or fear, it must be carefully considered; that the jury was to consider the condition of the defendant and the witnesses at the time the alleged admissions were made; that the jury was to consider the fact that the defendant was charged with crime; that they were to determine whether the confession was voluntary or whether any inducement was held out by anybody. This court approved that instruction. Mr. Justice HARLAN said, —

> "It is true that the fact of a prisoner being in custody at the time he makes his confession is a circumstance not to be overlooked, because it bears upon the enquiry whether the confession was voluntarily made or was extorted by threats of violence, or made under influence of fear; but confinement or imprisonment is not of itself enough to justify the exclusion of a confession if it appears to have been voluntary and not obtained by putting the prisoner in fear, or by promises."

In *Hopt* v. *Utah*, 110 U.S., 574, there was evidence that the prisoner made a confession or admissions to a police officer, but there was no evidence that the police officer said anything to the prisoner. There was no evidence of any inducement or fear other than that the defendant was under arrest. In dealing with the question raised in that case, Mr. Justice HARLAN said, at page 583, —

> "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion."

See *Com.* v. *Nott*, 135 Mass., 269, at page 272.

If the court deems it proper to refer to the transcript of the testimony sent up at the defendant's request, it will be seen that, in the case at bar, no instructions were given to the jury upon the effect of this evidence.

II.

The court should have permitted the defendant in the cross-examination of Power, and for the purpose of showing interest, to ask him, "What other articles belonging to the defendant did you take possession of at that time?" (Tr. p. 44, Ass't 15.)

On cross-examination, Power testified that, at the interview with the defendant heretofore referred to, he took

possession of a pair of suspenders belonging to the defendant, and kept them in his office until the prisoners were to come to Boston, when he handed them over to the Halifax superintendent of police, and they were sent to Boston with other property of the defendant. The defendant's counsel then asked him the question contained in assignment 15.

The damaging effect of Power's testimony has already been alluded to, and is apparent. It became, therefore, very important that the defendant should, if he could in any legitimate way, break the force of it by showing the presence, in the witness' mind, of any undue interest in the defendant's conviction. This might be indicated by improper zeal exhibited in his treatment of the prisoner during the interview in question; it might be shown by the taking from the prisoner of articles of value which were never returned; it might further be shown by the taking of something which would have furnished evidence for the prisoner and by suppressing it to his consequent detriment. In any of these aspects, the question excluded was fairly directed to the discovery of bias or interest on the part of the witness.

The principle for which we are here contending is well stated by Mr. Justice PECKHAM in —

> *Tla-Kloo-Yet-Lee* v. *United States*, 167 U.S., 274.
> *Willis* v. *Russell*, 100 U.S., 621.
> *Gilman* v. *Higley*, 110 U.S., 47–50.
> *Com.* v. *Yotsing*, 7 Kulp. (Pa.), at page 355.

The question was admissible, also, by virtue of the rule that when one party elicits a portion of what was said and

done at a certain interview, or in a certain connection, the other party may ask for the whole, and give his version of it.

Power's *treatment* of the prisoner had quite as important a bearing upon the character of the interview as his language, and was just as much a part of the interview. The learned judge erred in preventing the defendant's counsel from pursuing this line of inquiry, and ruling that it was not proper cross-examination. (Tr. p. 44.)

In this connection we invoke the rule that, —

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."
>
> HARLAN, J., in *Vicksburg & M. R.R. Co.* v. *O'Brien*, 119 U.S., 101.

III.

The court should not have permitted the United States attorney, on the government's case in chief, to ask the sailors Anderson, Loheac, Slice, Perdok, and Wassen, the hypothetical questions set out in assignments 16 *to* 21, *inclusive.*

These questions differed from each other only slightly in form, and were all for the purpose of showing what would happen to the vessel, assuming the conditions existing on the night of the murders, if the sailor steering her should leave the wheel. The question asked Ander-

son (Assignment 16), "If the vessel is on the starboard tack and under full sail and the sheet is eased off and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?" and the question asked Perdok (Assignment 20), "Now what effect would it have on that vessel under these conditions if you lashed that wheel?" — may be referred to in the argument of this point.

The only purposes for which it could be claimed that this evidence was introduced were, —

First, to corroborate Brown, the principal government witness (Tr. p. 121), who said (Tr. p. 118) that he stood with both hands on the wheel during all the time between 12 and 2 o'clock, and, consequently, when the murders were committed; or —

Second, to anticipate the theory of the defence, which, up to that time had not been suggested (Tr. p. 46), that Brown had equal opportunity with the defendant to commit the murders, and was in fact the murderer. For either of these purposes the testimony was inadmissible. Brown had testified for the government (Tr. pp. 23, 118) that while at the wheel he looked in at the window of the after-cabin and saw the defendant strike the captain. It was clearly incompetent to support the probability of this story, before it was controverted, by undertaking to show that, unless somebody had been at the wheel all the time, the vessel would have either fallen off or come up to the wind to such an extent as to be noticeable by those on board, especially by those on deck.

In other words, it was no part of the government's case in chief to show that Brown, whom the defence had not yet attacked, could not have committed the murders, be-

cause he could not have left the wheel without being discovered. It is as if the government had said, "Here is Brown, who says he did not leave the wheel; but lest the jury should have some doubt about this (although it has not yet been contradicted), we propose to show by experts that his story is extremely probable and ought to be believed, because, if he had left the wheel, the effect upon the vessel must have made his absence at once apparent."

In *United States* v. *Holmes*, 1 Cliff., 98, CLIFFORD, J. (at page 105), says, —

> "No principle in the law of evidence is better settled than the one enunciated in the rule that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it. . . . Tested by the circumstances under which the testimony was offered, it is clear it would have had no tendency to prove the issue, and in fact and truth could have had no other effect than to fortify the credit of the witness. . . . It cannot be maintained that testimony merely rebutting is admissible in anticipation of matters to be contradicted or explained. Such a rule would be a very inconvenient one, and finds no support in the decided cases or in the practice of the Federal courts."

IV.

Dr. Draper should not have been allowed to express an opinion as an expert as to whether a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe, would necessarily be spattered or covered with some of the blood. (Ass't 22.)

The pertinency of the question objected to is made clear by the record. No appreciable interval had elapsed after the murders were committed before Monks saw the defendant (Tr. p. 22), and he and the defendant remained constantly together until the crew were called after daybreak, except for the "brief time" when the defendant was in his room. (Tr. p. 22.) No spots of blood were ever observed on the defendant's person or clothing. This, it should be said, was equally true of everybody else on board. It was a part of the theory of the defence that no one could have committed the murders in the manner alleged without being so bespattered and soiled with blood as to be readily detected, unless he had had an opportunity to change his clothing and to wash himself before being seen, and that the defendant had no such opportunity. Dr. Draper's testimony was introduced for the purpose of breaking the force of this suggestion.

We contend that the testimony was inadmissible, because, —

First. Dr. Draper had never seen the bodies of the murdered persons, and could not express an opinion based upon his own observation of their condition; it was therefore not within the rule stated in —

Hopt v. *Utah*, 120 U.S., 430.

Second. The inquiry was not one for an expert. The answer did not require the application of any peculiar skill or scientific learning; the circumstances were all before the jury, any one of whom was as well qualified to form an opinion upon them as the witness. It was not a question in medicine, anatomy, or surgery, — although the object assumed to be cut was a human body, — but one merely of practical mechanics, *i.e.*, "In what direction will the particles of a body fly when the sharp edge of an axe is brought forcibly against and into it?" or "Could a person use an axe under the circumstances assumed in the question without being considerably spattered with blood?" It is to be observed that the sources from which the assailant might receive blood upon his person or clothing were twofold: that is, directly from the body struck, and also from the drippings of the axe. The question asked of Dr. Draper is not divided in accordance with this distinction, and must be taken to include both. If Dr. Draper's peculiar knowledge of the laws governing the circulation of blood in the human body gave him any advantage over the ordinary individual in possession of all the facts, — which we deny, — it is quite clear that such knowledge did not help him to express an opinion as to the amount of blood likely to come from off the axe to the person wielding it.

In *Brunker* v. *Cummins*, 133 Ind., 443, ELLIOTT, J., speaking for the court, said, —

> "It is safe to assume at the outset that, where the facts can be fully placed before the jury, opinion evidence even from experts, is incompetent, if the facts are of such a nature that jurors are as well qualified to form an opinion upon them as the witnesses."

See, also, *Railway Co.* v. *Kellogg*, 94 U.S., 469 (472).
Hopt v. *Utah*, *supra*.

Third. If the question was one for an expert, Dr. Draper was not qualified to answer it. As we have already suggested, the inquiry involved, in part, simple mechanics and, in part, common observation. If, however, peculiar skill were to be sought for the purpose of obtaining an opinion as to the direction in which the particles of a given substance, hewn with an axe, would fly, we submit that a woodcutter would be of far more assistance than a physician.

V.

The language of Judge WEBB *in the presence of the jury, during the cross-examination of the defendant, as to the loose sheets which the defendant had said were duplicates of the log, to wit, "He [the defendant] was making something to be used in evidence; a pure manufacture at that time" (Tr. p. 52), was a violation of the defendant's right to an impartial trial, and had a tendency to seriously prejudice him in the minds of the jury.* (Ass't 23.)

It is not easy to approach the discussion of this unfortunate episode without indignation, or to deal with it in a wholly unimpassioned manner. We can hardly conceive of anything more improper or more fatal to the prisoner's case than such comment under such circumstances. If a judge, "to whose lightest word the jury, properly enough, give a great weight" (SHIRAS, J., in *Hicks* v. *United States*, *infra*), charges the defendant on the witness stand, in language and in effect, with having manufactured evidence to be used to meet an anticipated accusation, the

only inference that can be drawn from the remark is, that, in the opinion of the court, the defendant is guilty. Evidence would not be "manufactured" under such circumstances by an innocent person. It is, we submit, almost as if the learned judge had turned to the jury and, with the prestige, dignity, and influence of his office to emphasize the statement, had said to them explicitly, "Gentlemen, the defendant is guilty of the offence charged in this indictment."

It is important to consider briefly the circumstances under which this remark was made: the witness was on trial for his life and under examination by opposing counsel. On his cross-examination he had testified (Tr. pp. 50 *et seq.*) that he made certain duplicate sheets from the log-book for the purpose, in case the vessel went off, of having the so-called duplicates on shore to show. The witness, also upon cross-examination, stated many differences between the original log and the so-called duplicates. Subsequently, during the cross-examination, and after the log-book and loose sheets had been put in evidence, the defendant was asked, —

> "*Q.* (By the United States attorney.) What was the course you were sailing?
>
> "*A.* For Cayenne.
>
> "*Q.* No; what was your course that you were sailing from the day before, through the night, and up to the time that you started for French Cayenne?
>
> "*A.* Well, just give me the log book and I will refer to it.
>
> "*Q.* No; can't you recollect that?
>
> "Defendant's Counsel. — I think he is entitled to the log book, your honors."

The district attorney then produced the log-book and had certain loose sheets of paper in his hand, being the so-called duplicates.

"The Defendant. — Let me take those [referring to the sheets the attorney held].

"District Attorney. — Well, you take the log book and determine from that.

"Witness. — Well, I think I am entitled to the whole thing that has any connection with this time.

"WEBB, J. — Your counsel will see that you have your rights. If you want anything, you may have it if it is proper. If you ask for those sheets, you are not entitled to them in reply to that question.

"Defendant's Attorney. — If they will enable the witness to refresh his recollection, if your honor please, a memorandum made by him in reference to this same matter —

"WEBB, J. — Mr. Cotter, this witness has testified that he, day by day or habitually, entered in his log book proper memoranda, or notations, he called them, of the progress of the ship on the voyage.

"Mr. COTTER. — Yes, your honor.

"WEBB, J. — But after he got about on the other course, several days after, he took it into his head that the ship when she sailed from whatever port she might make might carry away that log book, and undertook to make what he called a duplicate.

"Mr. COTTER. — Yes, your honor.

"WEBB, J. — And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time.

"Mr. COTTER. — It appears, however, that that was made from something else than this log book.

"WEBB, J. — Well, now he is asking him about this log book, to give the ship's position.

"Mr. COTTER. — That he copied from this log book, and we submit that he is entitled to that, your honor."

The stenographer read the question, *i.e.*, —

"*Q.* What was the course you were sailing?

"Witness. — For Cayenne.

"*Q.* No; what was the course you were sailing from the day before, the night, and up to the time that you started for French Cayenne?"

The case then proceeded.

"District Attorney. — Now, I would like to have him answer.

"One of the Court. — Do you object, Mr. Cotter? I saw you rise.

"Mr. COTTER. — I would like to have the reporter read the last two or three questions."

The stenographer read the question again, and, at Mr. Cotter's request, read what took place between himself and Judge WEBB, up to and including the words by the judge:

"And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time.

"Mr. COTTER. — That statement, your honor, we object to. We take exception to your honor's statement that it was a pure manufacture.

"WEBB, J. — I didn't say anything about a 'pure manufacture.'

"The stenographer. — I so understood it, your honor.

"WEBB, J. — Well, strike it out; strike out all that I have said. Every remark I made may be stricken out."

The exception to this language was alleged before a new question was asked the witness, and as soon as one member of the court saw the defendant's counsel rise for the purpose of claiming it. At the conclusion of the colloquy between the defendant's counsel and Judge WEBB, the former, with the permission of the court, to avoid any misunderstanding, asked the stenographer to read what was said pending the objection to the question propounded by the United States attorney, and, immediately at the conclusion of the reading, counsel objected and excepted to the remarks of the judge. (Tr. p. 52.) The defendant did all that it was possible for him to do.

We do not know of any rule of the Federal courts which makes it necessary, in order to save an exception, that the court should expressly reserve it.

Sheppard v. *Wilson*, 6 How., 260 (275).

But even if no exception had been alleged, we submit that the injury caused the defendant by the remark is so evident that this Court would not refuse to consider it.

Storm v. *United States*, 94 U.S., 76.
Suydam v. *Williamson*, 20 How., 427 (433).

It may be argued that the subsequent disavowal and withdrawal of the remark cured the error, but we submit

that the language was of such a character that no withdrawal, however prompt and emphatic, could have obliterated, or even modified, its effect. One might as well attempt to heal a wound by withdrawing the dagger. It was irrevocable and incurable, and its effect under the circumstances, coming from such a source, supported by the weight and dignity of the speaker's office, was incalculable.

It may be argued, further, that the error was obviated by the following language in the judge's charge, between which and the remark in question several days had elapsed: —

> "You are now approaching that part of this proceeding where the sole responsibility rests upon yourselves. You have heard the evidence, under such directions as the court has given with regard to its admissibility; you have seen the witnesses; you have heard the arguments of counsel upon both sides. But you are to remember that testimony, to analyze it, to weigh it, to compare its different parts together to determine for yourselves what the evidence establishes to your minds, and act upon it. You are not to be governed by the arguments of counsel beyond that degree to which they commend themselves to your own understanding and your own intelligence. You are not to be affected by any admissions or statements made by counsel in opening or closing, but you are to be governed by the evidence and the law. You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court, you would have no authority to accept it in substitution for your own inde-

pendent, original, careful determination on the matters yourselves. . . . But you are the final arbiters of the evidence and of the fact under the law as the court shall give it to you." (Tr. p. 59.)

Such language in the charge does not cure the error.

Mr. Chief Justice FULLER, in —

Allison v. *United States*, 160 U.S., 203, at page 210, says, —

"In our opinion, the liability of the jury to thus understand these observations was so great that their utterance constitutes reversible error. *Nor was this error obviated by what the judge said in his charge to the jury.* . . .

"If this [part of the charge] could be, in any aspect, treated as a modification of the previous assertions of the court, it was too far separated from that connection to permit us to attribute that operation to it."

And again, this court has recently disapproved of such utterances by the trial court, in the following explicit language: —

. . . "Such denunciation of the testimony of an accused is without legal warrant. *Allison* v. *United States*, 160 U.S. 203. Indeed, this instruction, besides giving rise to this error, was also, if possible, more markedly wrong from the implications which it conveyed to the jury. . . . In *Starr* v. *United States*, 153 U.S. 626, speaking through Mr. Chief Justice FULLER, this court called attention to the fact that there were limitations on the power of the Federal court, in commenting on the facts of a case, when

> instructing a jury, limitations inherent in and implied from the very nature of the judicial office. In *Reynolds* v. *United States*, 98 U.S. 168, speaking through Mr. Chief Justice WAITE, this court said also on the same subject: 'Every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked and . . . it is the imperative duty of a reviewing court to take care that wrong is not done in this way.'"
>
> WHITE, J., *Hickory* v. *United States*, 160 U.S., 425.

We concede that Judge WEBB may not have realized the full significance of his remark. His disavowal of the language used indicated that he uttered it without reflection, and was, perhaps, conscious of its impropriety.

The opinion of Mr. Chief Justice FULLER in *Starr* v. *United States*, 153 U.S., 624, is peculiarly applicable to the case at bar:

> "We are not insensible to the consideration that the learned judge probably did not intend that his words should bear so sweeping a signification. . . .
>
> "We are compelled to add some further observations in relation to the charge before us.
>
> "It is true that in the Federal courts, the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to the jury: *and if no rule of law is incorrectly stated*, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. . . . But

he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. *M'Lanahan* v. *Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (182). As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of *law by which they are to be governed*, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to. . . . The same rule prevails in the courts of many of the states, and in the charge in *Com.* v. *Selfridge*, referred to by the court below, these views were expressed upon the subject: 'As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold it the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere, with my opinion, with the testimony in order to influence your minds to incline either way, I should certainly step out of the province of the judge into that of an advocate. All that I can see necessary and proper for me to do in this part of the cause, is to call your attention to the points or facts on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove these points, give you some rules by which you are to weigh the testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand if it can be avoided,

what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and law can be clearly discriminated, I should always wish the jury to leave the stand without being able to ascertain what the opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced to weigh the testimony and settle the merits of the case.'

"So the Supreme Court of Pennsylvania says: 'When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories, not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice.' *Burke* v. *Maxwell*, 81 Pa. 139, 153. See, also, 2 Thomp. Trials, Secs. 2293, 2294.

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. *Hicks* v. *United States*, 150 U.S., 452. . . . The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree and that indignation was expressed in terms which were not consistent with

due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances. . . . Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

It was for the jury to determine what weight was to be given to the testimony of the accused. The remarks of Judge WEBB to counsel, in the presence of the jury, were prejudicial error.

People v. *Mino*, 149 N.Y. Ct. App., 324.
Com. v. *Foran*, 110 Mass., 179.

"It must be remembered that men may testify truthfully, although their lives hang in the balance and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one, if the judge, to whose lightest word the jury properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge,

whose duty it is to give reasonable effect and force to the law."

SHIRAS, J., *Hicks* v. *United States*, 150 U.S., 452.

The language of Judge WEBB, set forth in the assignment in the case at bar, was unwarranted, and most damaging to the accused, and was not made less so by the fact that, on exception taken, he attempted to disavow it, and then ordered the stenographer to strike it out. This was apparently done to nullify the defendant's exception.

Error is not always cured by withdrawal of or striking out objectionable declaration by the court.

As was said by WHITE, J., in *Waldron* v. *Waldron*, 156 U.S., p. 361, at page 383, —

"There is an exception, however [to the rule that an attempted correction by the court will cure the error], to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature, that it must have affected the minds of the jury despite the correction by the court. The rule and its exceptions were considered in *Hopt* v. *Utah*, 120 U.S., 430, where the foregoing authorities were cited, and the principle was thus stated by Mr. Justice FIELD: 'But independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with its accompanying instruction, cured the error. It is true that in some

instances there may be such strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the original objection may avail on appeal or writ of error, but such instances are exceptional.'"

VI.

The court should have permitted the defendant, for the purpose of fully stating and explaining what had occurred at a certain interview between himself and Captain Nash, at the time of his shipment, as to which he was examined by the United States attorney, to introduce certain letters of recommendation from the defendant's former employers, which, the defendant testified (Tr. p. 53) he showed to Captain Nash.

It is a principle of evidence too well settled to require elaborate discussion, that if one party, upon the examination of a witness, elicits a portion only of a certain conversation or transaction, the other party may, if he desires, introduce the whole of such conversation or transaction, and may prove his version of it.

The United States attorney, in the case at bar (Tr. p. 53), for the purpose of arguing that the defendant when he engaged to ship on the *Herbert Fuller* had misled the captain, — the inference being that he then meditated this crime, — elicited the fact from the defendant on cross-examination, that he (the defendant) had told the captain, at the time of shipment, that he came from Nova Scotia, yet he had lived in Nova Scotia only a month, and that at a time three or four years prior to so stating to Captain

Nash. On redirect examination he said that he showed to Captain Nash various letters of recommendation from his former employers, and offered to introduce these letters in evidence for the purpose of showing that he had dealt frankly in conveying the information he had to the captain, and also of meeting the suggestion of the government that he had deceived the captain by stating that he hailed from Nova Scotia. The government objected, the objection was sustained, and the defendant excepted. (Tr. p. 53.)

The question whether the defendant did in fact mislead the captain during the negotiations for shipment could not fairly be determined without a knowledge of all that was said and done between them in the course of the conversation, or conversations, which led to the defendant's shipment. To the suggestion of deceit made by the government, the defendant was ready to reply, "I did not mislead Captain Nash. I showed him various letters from my former employers containing certain information as to my previous employment and character, which should be considered in connection with any statements I may have made to him."

The court in refusing to allow him to make this explanation, and to show the nature of the information about himself which he gave to Captain Nash through these letters, permitted the jury to come to a conclusion upon this issue from a fragmentary account of what had transpired. This, we maintain, was clearly error. Mr. Justice BROWN, in a recent case, speaking for this court, says, —

> "If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and it may be that the defendant was not prejudiced by

the conversation as actually proved, but where the whole, or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary or contradict it."

Carver v. *United States*, 164 U.S., 694, at page 697.

It was legitimate for the defendant to strengthen and explain his position.

See *People* v. *Barberi*, 149 N.Y. App., 256 (269, 273).

VII.

The court should not have permitted the witness Parker (Ass't 27) to testify on the government's case in rebuttal as to the length of the voyage from Cayenne to Buenos Ayres.

The pertinency of this testimony is as follows: It appeared in evidence that, immediately after the murders, the *Herbert Fuller* then being in about latitude 36° N. and longitude 53° W. (Tr. p. 50), the defendant suggested that she should be headed to go to Cayenne in French Guiana (Tr. p. 23), claiming that that was the nearest port towards her destination, namely, Rosario *via* Buenos Ayres. (Tr. p. 56.) At the trial, he so testified on his direct examination, and, on cross-examination, in this connection, said that the ordinary trip from Boston to Buenos Ayres took from fifty to seventy days. (Tr. p. 56.)

For the purpose of proving that the suggestion to go to Cayenne was an unreasonable and improper one, under the circumstances, and that it was therefore an indication of

guilt, the government called the witness Parker in rebuttal, who testified, in response to a question by the United States attorney, that, under favorable conditions, it would take from fifty to sixty days to go from Boston to Buenos Ayres. He was then asked how long it would take to go from Cayenne to Buenos Ayres. The defendant objected, and upon his examination of the witness, it appeared that although he (the witness) had sailed from Boston to Buenos Ayres, from Boston to Cayenne, and from New York to Cayenne, he had never sailed from Cayenne to Buenos Ayres, nor to Cape St. Roque (around which it would be necessary to sail in going from Cayenne to Buenos Ayres), nor from Cayenne to any other South American port. (Tr. p. 56.) The defendant's objection was overruled and an exception taken. The witness answered, "Not less than 75 or 80 days."

The question here raised is purely one of qualification. We are unable to see upon what theory it can be claimed that the witness' experience enabled him to answer the question which he was asked. He had never sailed between the ports named in the question. Moreover, it does not seem to be of the class of questions that a skilled navigator (assuming Parker to have been such) could answer unless he had actually made the voyage. It was not within the rule laid down in *Hopt* v. *Utah*, which has already been quoted in this brief in the argument under Assignment 22. The witness had had no personal observation of, or experience with, the course from Cayenne to Buenos Ayres, nor does it appear that he had any knowledge, acquired by study or inquiry, of the prevalent currents or winds which a sailing vessel going from one port to the other might encounter. His testimony, if believed, would indicate that it would have been advisable

for the *Herbert Fuller* to return to Boston and sail from that port to her destination rather than to proceed to Cayenne and clear from there to Buenos Ayres. It left open to the government the opportunity to argue that there was some ulterior and improper motive in the defendant's suggestion to take the vessel to Cayenne. In this aspect it was clearly damaging to the defendant, and, if the witness was not qualified, is ground for reversal.

VIII.

The language of the United States attorney in his final argument to the jury (Tr. p. 58), referred to in Assignment 33, viz., "He [meaning the defendant] says that Charlie Brown could leave the wheel. I say he could not. They [referring to counsel for the defendant] have produced a lot of sea-captains to say that he could leave the wheel. I put on Mr. Cutler, who was a mate on that vessel, and if you can argue from the non-production of witnesses, can you not argue from the failure to put questions?" — was so improper and so prejudicial to the defendant, especially when coupled with the comment of Judge WEBB *upon it, viz., "The facts are before the jury, the fact of calling the witnesses," as to be ground for reversal.*

As we have already stated, the defence contended that the witness known as "Charlie Brown" could have lashed the wheel of the vessel and left it for a sufficiently long time to commit the murders without his absence being necessarily detected. The government had forestalled this suggestion by calling certain of the sailors on the vessel (Anderson, Loheac, Slice, Perdok, and Wassen) on its case in

chief, and asking them the questions which have already been discussed. In rebuttal, the prosecution called one Cutler, who, it appeared, had previously sailed as mate on the *Herbert Fuller*, and attempted to elicit from him testimony of a similar character to that given in chief by the sailors. This was objected to by the defendant and excluded. The defendant did not cross-examine the witness. The portion of the argument designated in Assignment 33 referred to this episode at the trial and to testimony of this class.

The United States attorney sought, in the language quoted, to argue upon the significance of the fact that the defendant had asked Cutler no questions with reference to the matters about which the court had refused to allow him to testify. The defendant excepted to that portion of the argument. Thereupon Judge WEBB interposed the following comment: "The facts are before the jury, the fact of calling the witnesses." The United States attorney then said, "I withdraw that. That may be stricken out."

The passage quoted is objectionable, first, because it contained a statement by counsel, as if upon his own knowledge, that a material and important fact contended for by the defence, to wit, that "Charlie Brown" could leave the wheel, was not so.

Again, in the passage quoted, counsel sought to argue upon evidence excluded by the court. It was the duty of the court, when attention was called to this fact, to stop such argument then and there. Instead, however, of so doing, Judge WEBB, after objection and exception by the defendant, approved and enforced the argument by the significant remark, "The facts are before the jury, the fact of calling the witnesses." It was, we submit, equivalent to saying to the United States attorney, "It is

not necessary for you to argue that point, if it is objected to. The jury will understand the situation from the fact that you called the witness; it needs no further suggestion on your part." This, we respectfully contend, affords a further illustration of the adverse attitude which Judge WEBB had assumed toward the defendant, and had a tendency to prejudice him, independent of the impropriety of its implied approval of the objectionable argument of counsel.

It may be argued that the withdrawal, upon objection, of the remark made by counsel, obviated its damaging effect; but we understand the rule to be that the withdrawal of objectionable matter still leaves open for the appellate court the question whether such withdrawal was effectual to protect the defendant. There are numerous cases bearing more or less directly upon this point. In *Graves* v. *The United States*, 150 U.S., 118, it was held that—

When the attention of the court is specifically called to objectionable argument and objection is made to it, it is the duty of the court to interfere if it is likely to be prejudicial to the accused.

In the case at bar, as we have already submitted, the learned judge, very far from interfering, impliedly approved the language of the United States attorney.

See—

Seligman v. *Ten Eyck*, 60 Mich., 267.
Fuller v. *State*, 30 Tex. Ap., 560, 559.
Florence v. *Field*, 16 So. (Ala.) 538.
Hollywood v. *Reed*, 57 Mich., 234.

In this connection we quote the language of Mr. Justice WHITE in *Waldron* v. *Waldron*, 156 U.S., at page 380:

> "It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and it is equally well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor."

See —

Hall v. *United States*, 150 U.S., 76.
Wilson v. *United States*, 149 U.S., 60.
Hennies v. *Vogel*, 87 Ill., 242.
Mo. R.R. Co. v. *Metzger*, 24 Neb., at page 90.
Newton v. *The State*, 21 Fla., at pages 92, 96.
Brown v. *Swineford*, 44 Wis., 282.
People v. *Mitchell*, 62 Cal., 411.
Tucker v. *Henniker*, 41 N.H., 325.
Hill v. *State*, 42 Neb., 503.
Belyea v. *Minn.*, 63 N.W. Rep., 627.
Chicago v. *Barron*, 57 Ill. Ap., 469.

An assertion by counsel as to what a witness not called would testify, is ground for a new trial, even though the court rebuked the counsel and directed the jury to disregard his remarks.

Morris v. *Maddox*, 97 Ga., 575.

IX.

The court, in a capital case (Ass't 37), should have allowed the general exception of the defendant taken at the conclusion of the charge and before the jury had retired; but, whether allowed or not, the objectionable matters therein alleged are before this Court and may be considered.

Immediately after the charge, and before the jury had retired, the defendant claimed an exception —

> "to all objectionable and prejudicial matter, whether it was elicited by the government or the court, and to all statements of fact and opinion and examination of witnesses by one member of the court during the trial, which said matter, statements of fact, and opinion, and examination of witnesses, more specifically appear in the official stenographic report of said trial, to which reference is hereby made at pages 1080, 1348, 1372, 1385, 1482, 1483, 1484, 1490, 1572, 1593, 2000, and *aliunde*, and whether such statements, opinions, and examinations were withdrawn or not; on the ground that no right of exception is, or can be, waived in a capital case."

The questions raised under this assignment are —

First. Are the alleged objectionable matters referred to in the defendant's claim of exception properly before this Court?

Second. Will this Court consider them, even though not alleged with technical propriety and exactness? and —

Third. If the Court will consider them, are they so objectionable as to constitute reversible error?

The specific matters relied upon by the defendant under

the above claim of exception are set out in full in the record. (Tr. pp. 60 *et seq.*) They are all questions or comments by Judge WEBB, and, briefly stated, are as follows:

(*a*) The question to the government witness Loheac (Tr. p. 60)

> "*Q.* When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts? *A.* Yes, sir."

(Loheac's testimony tended to show that if Brown had left the wheel, which the defence contended he could have done for a sufficient length of time to commit the murders, the course of the vessel would have been materially changed. (Tr. p. 45.) The "person upon the deck" referred to the defendant, who was officer of the watch.)

(*b*) During the cross-examination of the defendant (Tr. p. 60), the comment, "He [the defendant] says he never did tell Mr. Monks so. If he never did and Monks says he did, every one will understand the consequences."

(*c*) The characterization of the loose sheets made up by the defendant, as "a pure manufacture," to which reference has already been made in this brief, in another connection. (Tr. p. 52.)

(*d*) The characterization (Tr. p. 63), during its progress, of a portion of the closing argument of the senior counsel for the prisoner as "far-fetched." (Ass'ts 23, 34, 35, 36.)

1. Is this exception before this Court? Does the fact that it was not allowed or reserved by the trial court deprive the prisoner of its benefit if he were otherwise entitled to it?

We cannot conceive that, if a defendant has properly

excepted, and it so appears upon the record, the mere refusal of the trial court to allow or reserve the point will be permitted to prejudice him. But, —

2. Did he except in a proper manner and at a proper time?

It was during the trial, and while the judge had opportunity to modify, if he could, the effect of the remarks and conduct alluded to in the request.

There is no rule for the Circuit Court for the District of Massachusetts prescribing when an exception must be taken, and the Revised Statutes are silent upon that point.

It must be conceded that it would have been better and more usual to allege the exceptions at the time the objectionable language was uttered in each instance. But is the neglect to do this fatal? This brings us to the consideration of the questions (1) whether any right of exception is, or can be, waived in a capital case? and (2) how far an appellate court will go to correct an error apparent upon the face of the record, though not reserved, or not properly reserved?

Much has been said by the courts upon this subject which indicates that the humane and beneficent rule universally prevails that, in a criminal case, and particularly in a capital case, the appellate court will consider any error apparent on the record, whether objection has been raised and exception taken in the trial court or not.

In *Rex* v. *Tilley*, 2 Leach, C.C. (4th ed.), 662, at page 670, the court, by Mr. Justice BULLER, said, —

> "In criminal cases, it is never too late to revise what has been done, and if, at any time, it appears that a prisoner is entitled to an advantage, though the ob-

jection be made out of time, the Court will always anxiously endeavor to give the prisoner the benefit of it, and find out some way in which he may avail himself of it."

In *Falk* v. *The People*, 42 Ill., 331, the court says (pp. 335, 336), —

"Suppose all the instructions given by the Court to a jury in a capital case wrong, — that they do not announce correct legal principles, or, being correct, are inapplicable to the case, and no exceptions are taken to them, — would it be the duty of an appellate court, under such circumstances, when the record shows a prisoner has been illegally condemned by misapplication of the law to his case and he asks a review of the proceedings, that such court, in the face of the record should pronounce the sentence of death upon him? An appellate court would pause when called on, under such circumstances, to pronounce the sentence, — to consign to the gallows a human being, *a record of whose trial fails to satisfy that court that justice under the law has been meted out to the prisoner*."

And in New York, the Court of Appeals has said, —

"The same strictness with respect to exceptions does not prevail in criminal as in civil cases, but the court will look at the substance rather than the form with a view to promote justice."

O'Brien, J., in *People* v. *Ledwon* (N.Y.), 46 N.E. Rep., 1046 (1048).

Again, the same learned judge has said, in —

People v. *Barberi*, 149 N.Y. Ct. App., 256, at page 278, —

"An erroneous statement of the law, or improper comments upon facts or the evidence bearing upon them, may be reviewed and corrected in this court in a capital case, without any exception, when it can be seen that they may have operated to the prejudice of the accused."

But the Supreme Court of the United States has not been silent upon this point:

Exceptions need not be taken with great precision.

Allison v. *The United States*, 160 U.S., 203.

They may be general in form.

Lewis v. *The United States*, 146 U.S., 370.

And although a question is not properly raised, yet, if a plain error was committed in a matter which is absolutely vital to the defendant, this court may feel at liberty to correct it.

Wiborg v. *United States*, 163 U.S., (at p. 658).

And Mr. Justice CLIFFORD in —

Storm v. *United States*, 94 U.S., 76, says, at page 77, —

"Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment or execution of the suit, may be re-examined and corrected; but neither the rulings of the court in admitting or excluding evidence, nor the instructions

> given by the court to the jury, are a part of the record, unless made so by a proper bill of exceptions."

The same learned judge in *Suydam* v. *Williamson*, 20 How., 427, says, also, at page 433, —

> "When the cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal.
>
> "The rule is, that whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner."

The question raised under this assignment is unlike the ones passed upon in *Lewis* v. *United States*, 146 U.S., 370, and *Alexander* v. *United States*, 138 U.S., 353, which decided that objections presented after a verdict as grounds for a new trial were not seasonably presented and were not entitled to consideration in the bill of exceptions, inasmuch as objections made after verdict do not give the court an opportunity to vary the matters objected to during the trial. In passing upon the objection so made, the court, in the latter case, said, —

> "It is the duty of counsel seasonably to call the attention of the court to any error in empanelling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and in case of an adverse ruling to note an exception."

This was done by the defendant in the case at bar. He did all that the statutes of the United States and the rules of the trial court required him to do in order to present this exception.

Rev. Sts. U.S., sec. 953.

In this connection this Court has also said that many of the state statutes are —

> "much more stringent in their requirements as to the time and mode in which the bill of exceptions shall be obtained, than the statute of Westminster 7, which first gave the bill of exceptions."
>
> *Sheppard* v. *Wilson*, 6 How., 260, at page 275.

3. If the court will consider the exception, are the matters to which it applies so objectionable as to constitute reversible error?

With the permission of the court, it is now our duty to go further and to demonstrate that the matter objected to was seriously prejudicial to the defendant.

The episode during which occurred the comment by Judge WEBB, as to the loose sheets of the log, has already been fully discussed earlier in this brief. There are three other incidents of the trial specifically set out in the record in this connection (Tr. pp. 60 *et seq.*) : —

First. The murders were committed during the defendant's watch, when it was his duty to be on deck. (Tr. p. 22.) The government, on its case in chief, called one of the sailors, Loheac, whose testimony (already referred to) tended to show that Brown, who should have been at the wheel, could not have left it, even for a short period, so that the course of the vessel would not be changed. But the witness did not go so far as to say, in reply to the questions of the United States attorney, that such absence would have been noticeable. Thereupon Judge WEBB, apparently observing the omission, asked him the question which is found in the record (Tr. p. 60), —

"When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?"

To this question the witness answered, —

"Yes, sir."

We submit that this question was objectionable in form. It was leading and otherwise incompetent. It would not have been a proper question if put by the United States attorney. Its purpose clearly was to supplement the government's examination of the witness, and it did in fact elicit testimony which was damaging to the accused; for the inference was that if he had been at his post on deck, as he said he was, and the wheel had been left, his attention would necessarily have been called to the fact.

"Whilst a judge presiding at a trial has a right to put questions to a witness with reference to the issue on trial, and a court of review will allow much latitude, yet comments on the evidence, or creating evidence, or seeking to sustain a witness, by a trial judge, must be condemned." *Burke* v. *People*, 148 Ill., 70 (at p. 75).

Second. The defendant, on cross-examination (Tr. p. 60), denied that he told Monks, while on board the ship, that he was a French Canadian. Thereupon the government counsel asked him the following question: —

"If he [Monks] says that, is he telling what is not true?"

The defendant's counsel objected, and, after a colloquy, which we think is not material to the point, between coun-

sel and Judge WEBB, the latter said (referring to the question quoted above), —

> "The question is only meant to emphasize the other answer. He says he never did tell Mr. Monks so. If he never did, and Monks says he did, every one will understand the consequence."

This remark, we concede, was ambiguous. In one sense, and by itself, it was not harmful; in another, and taken in connection with the previous attitude of the judge, it may have been highly so, for there was danger that the jury would understand the learned judge to mean that there could be no doubt, as between the defendant and Monks, that the latter was telling the truth.

Third. During the closing argument of the defendant's senior counsel, the latter called attention to the fact that, while both Brown and Bram were brought to Boston in custody under suspicion of these crimes, Brown appeared as a witness before the grand jury and Bram did not, — in the following language (Tr. p. 62): —

> "The grand jury assembled in October, and you are solemnly informed by the learned district attorney that the grand jury found no bill against Brown. There is something he did not tell you, but which appears in the evidence now, Mr. Foreman and gentlemen, that Brown, a defendant charged with murder, under some mysterious arrangement is brought before the grand jury" —

At this point the United States attorney interrupted, saying, —

> "I beg your honors' pardon. There is no evidence

of what the arrangement was; none at all, on God's footstool.

"Mr. COTTER (of counsel for defendant). — I beg your pardon.

"WEBB, J. — Let us hear what the arrangement was.

"Mr. HOAR (the United States attorney.) — Mr. Cotter says that under some mysterious arrangement Mr. Brown is brought before the grand jury. Now there is absolutely no evidence on that subject in this case whatsoever. I do not think it is proper —

"Mr. COTTER. — I want to be heard on that, if your honor please. Brown is charged with murder. Brown testified himself that he was brought before the grand jury and permitted to testify. [See Tr. pp 60, 61.] Bram has testified that he was not brought before the grand jury and was not permitted to testify. I say that there is a discrimination between these two men, and I have a right to argue from that discrimination that there is a mysterious arrangement.

"Mr. HOAR. — If your honors please —

"Mr. COTTER. — An extraordinary —

"WEBB, J. — It is far-fetched, but we do not propose to interfere."

It is not necessary for us to discuss the question whether the learned judge was justified in his estimate of this argument. It was, however, for the jury to determine independently how much weight should be given it; and the expression of a disparaging — not to say contemptuous — opinion, by the court, upon argument, legitimate or otherwise, could not have operated upon their minds except to weaken and discredit not only that particular portion of the argument, but to destroy their confidence in the

advocate and their respect for anything which he had urged, or might urge, upon them in behalf of his client. Nothing can well be imagined more calculated to depreciate the entire argument, than for the judge, in the presence and hearing of the jury, to characterize it, or any portion of it, as "far-fetched," — that is to say, strained, illegitimate, illogical, and unjustifiable.

The embarrassing and paralyzing effect upon counsel of such criticism, at such a time, should also not be forgotten. It could not but have seriously impeded him in his subsequent efforts in his client's behalf.

Enough appears upon the record, we believe, to show that Judge WEBB's attitude in respect to the question of the guilt or innocence of the accused, greatly increased the odds against him; not only, as we have indicated, by throwing the weight of his opinion into the scales, but by forcing the defendant's counsel to protest in the presence of the jury, and to place themselves in the unfortunate position of antagonizing the court, — and that, therefore, if for no other reason, the defendant did not have an impartial trial.

We think we ought not to leave the discussion of this subject without calling attention to the fact that we have appealed in vain to the learned judge himself to set aside the verdict upon this ground (Tr. p. 64), before submitting the question to the determination of this Court.

X.

It was error in the court, in a case where the evidence was of the character of that in the case at bar, and under the

circumstances shown by the record, to read to the jury the statement of law contained in Assignment 38.

This quotation was from *Com.* v. *Tuey*, 8 Cush., 1 (at p. 2). We are not unmindful that this language has been considered and approved by this Court in *Allen* v. *The United States*, 164 U.S. 492 (at p. 501). But while we must, therefore, concede that it is appropriate to certain cases, we still feel that it is a dangerous and pernicious doctrine if it is to be held applicable to all cases. Dangerous, because it is likely to be misunderstood by the jury; pernicious, because it has at least a tendency to control the exercise of independent, individual opinion on the part of the jurors, and to bring about that which our system of jurisprudence has never permitted: in effect, a majority verdict. Experience has taught every *nisi prius* judge and every practising lawyer that it not infrequently happens that a minority of the jury are right. If, in such a case, any pressure by the court — for it amounts to that — is brought to bear upon the minority to persuade them to conform to the majority opinion, a great wrong is done to one party or the other, and the principle at the foundation of the English jury system is endangered.

In the case at bar the life of a human being was at stake; the evidence was close, and was largely circumstantial; the only direct testimony, that of Brown, was not free from grave suspicion (see Tr. pp. 23 and 118 *et seq.*), and the jury had been deliberating between nineteen and twenty hours (Tr. p. 63); moreover, it was Saturday, many of them lived at a distance, and they had been separated from their families and their business for nearly three weeks. It was under these circumstances that they came into court for further instructions, and the above statement of the law, which, they were informed, was "from one of

the leading cases on the subject" (Tr. p. 63), was read to them.

In such a case, involving life, if a single juror honestly believes that the burden upon the government has not been sustained, is it not his paramount duty to his conscience and his God to stand firm in that opinion, rather than to endeavor to conform to that of his fellows for the sake of avoiding a mis-trial?

Should not the court hesitate to use any lever which may move him, perhaps improperly, from that position, and which may serve to excuse him *in foro conscientiae* in acquiescing in a verdict which his judgment leads him to believe is wrong?

The language of *Com.* v. *Tuey*, if leisurely considered and properly understood, may not be thought to seriously invade the right of a defendant to a constitutional trial; but the idea which it particularly emphasizes is the importance of unanimity. It neglects to impress the far more important principle which is applicable to the case at bar, that a human being is not to be consigned to the gallows unless twelve men are individually satisfied beyond a reasonable doubt, by the effect of the evidence upon them and each of them, that he is guilty.

We have ventured to discuss this question at some length, with the less diffidence, because *Com.* v. *Tuey* does not appear to have been a capital case, and *Allen* v. *The United States* was not argued in behalf of the plaintiff in error.

Points raised in Connection with the Two Motions for a New Trial.

I.

The First Motion.

(Assignments 40–51, inclusive, 53–61, inclusive, and 63.)
(Tr. pp. 64–105, inclusive.)

These assignments relate to affidavits and oral evidence offered by the defendant and excluded by the court at the hearing on the first motion for a new trial.

The defendant offered to prove that overt acts and extraneous matters prejudicial to him were presented to, and considered by the jury, without his knowledge; but the court, against the defendant's objection and exception, rejected all expressions of opinion between jurors during the trial, and by jurors to other persons after the trial, offered by the defendant for the purpose of proving the foregoing.

While ordinarily the allowance or refusal of a new trial rests in the sound discretion of the court, yet, in the case at bar, the court excluded an affidavit and oral evidence material to the defendant's contention, without exercising discretion. Exceptions were duly taken, and the question of the admissibility of the evidence which the court refused to consider was preserved.

The court erred in refusing to receive testimony offered and described in said assignments, also in the following ruling, given in denying the first motion for a new trial, viz., —

> "We do not think the testimony admissible as to any comments one of the jurors may have made during the progress of the trial to one or more of his fellow

jurors, with respect to Bram's testimony, or as to the so-called experiment of the jury in the jury-room during their secret deliberation upon the verdict." (Tr. p. 107.)

In *Mattox* v. *United States*, 146 U.S., 140, the court says, —

"There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

"This distinction is thus put by Mr. Justice BREWER, speaking for the Supreme Court of Kansas in *Perry* v. *Bailey*, 12 Kan. 539 (545): 'Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors: if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.'" See other cases cited in *Mattox* v. *United States*.

The trial court should have received and considered the evidence of jurors and others, described in the assignments, to show prejudicial, overt acts and extraneous matters in the jury-room or during the trial. The matters and things which the defendant offered to prove did not inhere to the verdict.

The defendant was entitled to show that the jury did not pass upon his case free from external causes tending to disturb the exercise of deliberate and unbiassed judgment.

Mattox v. *United States, supra.*

To support a motion for a new trial, affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury-room which does not essentially inhere in the verdict itself.

> "To receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance or the like, is to receive his testimony as to a fact which, if not true, can be readily and certainly disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury-room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them. . . . But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act. In other words, public policy protects a juror in the legitimate dis-

charge of his duty, and sanctifies the result attained thereby; but if he steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent the sanction of the law from attaching to that which would otherwise be colorably lawful."

Wright v. *Ill. & Miss Tel. Co.*, 20 Iowa, 195 (at pp. 211, 212).

Misconduct of a juror in the jury-room may be shown by the affidavits of his fellow jurors, and such misconduct is good ground for a new trial.

Griffin v. *Harriman*, 74 Iowa, 436.

If this misconduct can be shown by the affidavits of jurors it may be shown by oral evidence before the court.

The defendant offered to show at the trial that the juror Briggs stated of his own knowledge that he, Briggs, was a Freemason; that the defendant was not, and that the defendant was a hypocrite. This was clearly misconduct on the part of juror Briggs, and the court erred in not permitting the defendant to introduce evidence to show that misconduct.

A juror will not be permitted to state to his fellows while they are considering their verdict, facts in the case within his personal knowledge. It was his duty to make them known during the trial.

Richards v. *State*, 36 Neb., 17 (at pp. 27, 28).
Booby v. *The State*, 4 Yerg., 111.
Wood River Bank v. *Dodge et al.*, 36 Neb., 708 (at p. 715).
Hudson v. *The State*, 9 Yerg., 408 (410).

In this latter case, the affidavit of a juror was received in support of motion for new trial to show misconduct of certain of the jurors during their deliberation.

Perry v. *Bailey*, 12 Kan., at p. 545.
Wright v. *Ill. & Miss. Tel. Co.*, 20 Iowa, 195 (at p. 210).
Hyams v. *Eames*, 41 Fed. Rep., 676.

The defendant offered evidence that the juror Briggs had prejudged him guilty before the commencement of the trial.

See affidavit of James J. Connell, Tr. p. 67.
See, also, testimony of Daniel W. Bond, who said, —

> "I had a conversation with Mr. Briggs. I asked him if he was willing to go on a case of capital punishment. I also said I did not see how anyone having read the reports in the papers could think otherwise than what [*sic*] he was guilty; and, as I remember it, he thought as I did." (Tr. p. 95.)

The juror Briggs, on his *voir dire*, having stated that he had not formed or expressed any opinion in relation to the case, and was not sensible of any bias or prejudice with regard to it (Tr. pp. 75, 76), and having contradicted the Connell affidavit (Tr. p. 99), the case is within the principle stated in *Hyams* v. *Eames*, *supra*, namely, where, in a case based upon conflicting and voluminous evidence, it appears that one of the jurors had prejudged the case and concealed that fact from the defeated party, a new trial should be granted.

Therefore, for the purpose of supporting the defendant's contention that the juror Briggs had prejudged the case,

and of showing his frame of mind before the trial began, it was competent to prove his declarations during the trial to fellow jurors, and to other parties after the trial. The trial court erred in excluding the evidence offered for these purposes.

Where the question on a motion for a new trial is whether a juror declares himself in favor of one of the parties, before the trial, and there is evidence tending to show that he did so, the affidavits from jurors showing that he made similar declarations in the jury-room are admissible.

Hyams v. *Eames, supra.*

The experiment made in the jury-room, and described in the supplementary affidavit of the juror Booth (Tr. p. 66) and in the testimony of the juror Jack (Tr. pp. 69 *et seq.*), was for the purpose of assisting the jury to determine a vital issue in the case, namely, whether Brown, standing as he described himself to have stood, could have seen the defendant strike Captain Nash. This experiment was in the nature of evidence in the case, received by the jury not in the presence of the defendant, and which he therefore had no opportunity to control, explain, or vary. It would not have been admissible if offered to be made in the court-room during the trial.

Stokes v. *The State*, 5 Baxter (Tenn.), 619.
Chicago & E. R. Co. v. *Lee*, 46 N.E. Rep. (Ind.), 543 (545).

A fortiori, it should not be permitted in the jury-room. A similar experiment, under similar circumstances, was carefully considered and discussed in *Jim.* v. *The State*, 4 Humph. (Tenn.), 289 (292).

The language of the court in the case cited is particularly applicable to the so-called experiment in the case at bar:

> "Independent, then, of the doubtful and uncertain character of the proof introduced to establish the guilt of the prisoner, we cannot permit verdicts which have been obtained like this, upon uncertain and dangerous experiments, instead of a calm, deliberate, and philosophical examination of the proof, to stand where the lives of individuals are at stake.

See, also, *Yates* v. *The People*, 38 Ill., 527.

We have been unable to find any other cases in the books in which this interesting question is discussed.

It is true that the court in the case at bar admitted *de bene* the affidavit and the testimony describing this experiment, but, at the close of the hearing upon the motion, they held it to have been inadmissible, and excluded it from their consideration. (Tr. p. 107.)

In so rejecting it, they did not exercise discretion, and their action may be reviewed by this Court.

Mattox v. *The United States*, *supra*.

II.

The Second Motion.

(Ass'ts 64–67, inclusive.)

(Tr. pp. 113–124, inclusive.)

This motion was denied, *as a matter of law*, on the ground that the new evidence was cumulative, and that the defendant and his counsel failed to exercise due diligence in ref-

erence to it before the trial; and for these reasons only, the court held, —

"*Under well-established and familiar rules of law*, the motion must be denied." (Tr. p. 124.)

1. The court erred in its ruling that the evidence contained in the affidavits in support of the second motion for a new trial was cumulative.

State v. *Tyson*, 56 Kan., 686.

The affidavits of Spencer, Messenger, and Downey show the importance and character of the new evidence offered in support of the motion. (Tr. pp. 113, 114, 115, 116.)

The affidavits were in contradiction of the only direct evidence against the accused.

The trial court stated, in denying this motion (Tr. p. 124), that "both Spencer and Messenger testified that they had tried and could not see through the window in the cabin." But when the affiant Spencer, a government witness, and Messenger, a witness called for the defence, were testifying at the trial on this subject, the judges called attention to the fact that their observations were made in the daytime, thereby indicating to the jury that the conditions were not the same as they were when Brown claimed that he saw the accused kill the captain. (Tr. pp. 122, 123.)

There was no evidence at the trial of observations or tests made in the night time, with the conditions as they were at the time the murders were committed.

Consequently the new evidence was not cumulative.

Cumulative evidence offered in support of motions for a new trial on the ground of newly discovered evidence is often of a suspicious character, and hence the reluctance on the part of the court to order a new trial on that ground.

The rule does not apply to a case where the new evidence is trustworthy, reliable, and uncontradicted, as in the case at bar, where the tests and experiments were openly made, in the presence and at the request of counsel on both sides, of officers of the *Herbert Fuller*, and other persons, and where the furniture and other objects were arranged by Spencer, one of the government's principal witnesses, and where the facts stated in the affidavits are established beyond question.

The evidence set forth in the affidavits was not only material, but, if introduced at the trial, would probably have been decisive in favor of the accused.

The experiment in the jury-room, hereinbefore described, indicated that the jury was left in doubt as to whether Brown could have seen from the wheel what he testified to. The evidence in the affidavits tended to establish an independent fact, viz., that Brown could not have seen, in the night time, what he testified to, with conditions as then existing. There was no evidence offered at the trial, by the defence, of observations or experiments in the night time, to test the correctness of Brown's evidence. The court was particular to bring out the fact before the jury that the observations made by Spencer and Messenger were in the daytime, when there was no artificial light in the cabin, and, consequently, that their testimony at the trial did not contradict Brown:

> "We must assume, so far as the record shows, that the witness who swears in his affidavit to the newly discovered facts, is a credible witness, and if so, in view of the testimony before us, it appears to us that the newly discovered evidence is highly important, and would probably produce a different result on a new

trial. . . . If, as here, it relates to distinct and independent facts of a different character, though tending to establish the same ground of claim or defence, it is not considered cumulative within the rule."

Keeler v. *Jacobs*, 87 Wis., 545 (at pp. 550, 551, and cases cited).

Layman v. *Minn. St. Ry. Co.* (Supreme Court Minn.), 69 N.W. Rep., 329, decided Dec. 16, 1896, and authorities cited.

Cumulative evidence is "additional evidence of the same kind to the same point." And although it is additional to other evidence tending to prove the same position, yet it is not cumulative if it is of a different character, tending to establish the same general result by proof of a new and distinct fact.

Parker v. *Hardy*, 24 Pick., 246 (248).

The evidence in the affidavits aforesaid differed in character from any offered at the trial.

In *Gardner* v. *Gardner*, 2 Gray, 434 (443) the court says, —

"Whether particular testimony is cumulative or not, is often a question of some nicety. This Court has, in common with many other tribunals, been disposed to limit this objection as to cumulative testimony to that which is most obviously so, and not to apply it to all testimony tending to establish the same facts. If it differs in kind, as an admission of a party to some facts about which evidence had been given of a different kind, that has been thought sufficient to take it out of the rule."

"The rule or principle requiring the denial of a motion for a new trial on the ground of the evidence, newly discovered, being cumulative, does not rest upon any just or solid foundation. It is simply the dictate of authority which has been followed without much consideration of its foundation. It is not one to be extended to cases not falling directly within its language. For there is the same propriety and necessity for giving a party a new trial who can vindicate himself or sustain his cause of action by cumulative evidence, as there is for any other reason. And there is certainly no justice in subjecting a person to what is really an unfounded claim, or for preventing him from maintaining an equally well founded defence, because the evidence discovered by him by which that can be done may be of the same quality or description as that given upon the trial in which he has been defeated."

Bulkin v. *Ehret*, 29 Abbott's New Cases, 62 (at p. 64).
Wilcox Silver Plate Co. v. *Barclay*, 48 Hun, 54.

The rule is not without limitations.

Bailey v. *State*, 36 Neb., 809 (at p. 814).
Clegg v. *N.Y. Newspaper Union*, 51 Hun, 232 (at p. 237).

The trial court erred in deciding that it was legally bound to deny the motion for the reason that the new evidence was cumulative and might have been discovered by the exercise of due diligence before the trial.

The court *may*, in its discretion, set aside a verdict and order a new trial on the ground of newly discovered evi-

dence, even if the evidence is cumulative and might have been discovered by due diligence before or during the trial.

Keet v. *Mason*, 167 Mass., 154.

2. The evidence on the second motion did not show laches on the part of the defendant or his counsel, and the court refused to exercise discretion, and erred in ruling that it was bound, as a matter of law, to deny the motion for a new trial. (Tr. p. 124.)

As to diligence of the defendant and his counsel, see record. (Tr. p. 117.)

Nothing was said before the trial as to the position of Brown and of the accused when the captain was killed. (Tr. pp. 118, 119, 120, 121.)

The evidence set forth in the affidavits could not have been obtained until the arrival of the *Herbert Fuller* in New York after the trial. (Tr. p. 113.)

At no time was the *Herbert Fuller* in this country after the murders were committed and before the verdict of the jury. The accused was without means, all the money in his possession having been taken from him at Halifax. (Tr. pp. 123, 125.)

When the witness Messenger was directed by the defendant's counsel to go to Halifax and examine the *Herbert Fuller*, the defendant, Charles Brown, and the sailors were all in jail in Boston; the passenger, Monks, was in Brookline, Mass., Spencer was in New York, and there was no one in Halifax during the stay of the *Herbert Fuller* there, after the defendant had secured counsel, who could have shown the condition of things as they were on the night of the murder. (Tr. p. 123.)

The rule against laches is not to be applied in criminal cases.

Andersen v. *State*, 43 Conn., 514 (at p. 518).

What constitutes due diligence depends so much on circumstances that it must be left largely to the discretion of the trial court.

Jones v. *Singleton*, 45 Cal., 92.

> "In criminal cases, when the life or liberty of the citizen is involved, a judge may properly exercise a liberal discretion in allowing a person convicted to have another opportunity of explanation and defence, when there is reasonable doubt as to guilt or fairness in the first trial."

Chandler v. *Thompson*, 30 Fed. Rep. (at p. 44).

The motion for a new trial is addressed to the discretion of the trial court, but where that court excludes from its consideration proper evidence offered by the moving party, or rules upon a question of law, such exclusion and ruling are reviewable by the appellate court.

Mattox v. *United States*, 146 U.S., 140.
Behan v. *Williams*, 123 Mass., 366.
Protection &c. Ins. Co. v. *Dill*, 91 Ill., 174.

For all of which reasons, we respectfully submit that the judgment of the court below should be reversed.

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